(20,490.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 173.

WARE AND LELAND, A COPARTNERSHIP, AND J. H. WARE, E. F. LELAND, CHARLES W. LEE, AND F. J. FAHEY, PLAINTIFFS IN ERROR,

vs.

MOBILE COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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1 & 2 (Title Page.)

1 Div. 354.

Supreme Court of Alabama.

Filed Apr. 3, 1906. Robt. F. Ligon, Jr., Clerk.

J. H. WARE ET ALS., Partners, &c.,
vs.
MOBILE COUNTY.

Appeal from Mobile Circuit Court.

April 3, 1906, submitted on briefs.
May 8, 1906, Affirmed. Tyson, J. (To be reported.)

3 A Transcript of the Record and Proceedings had in a Certain Cause Pending in the Circuit Court of Mobile County, Alabama, Therein Lately Pending, Wherein Mobile County was Plaintiff and J. H. Ware, Edward F. Leland, Charles W. Lee, and Frank J. Fahey, as Partners, Doing Business Under the Firm Name of Ware & Leland, were Defendants.

Complaint and Summons.

In Circuit Court of Mobile County, Alabama, Fall Term, 1903.

MOBILE COUNTY, Plaintiff,
vs.
J. H. WARE, EDWARD F. LELAND, CHARLES W. LEE, and FRANK J. FAHEY, as Partners, Doing Business under the Firm Name of Ware & Leland, Defendants.

1. The plaintiff claims of the defendants, doing business under the name above set forth, one hundred and fifty dollars for the balance of County license tax due from them to it on, to-wit, the 4th day of March 1903, for that they, as such partners, did engage in the business of buying and selling futures on commission for other persons in the City of Mobile in said State after said 4th day of March, without having taken out and paid therefor the County license tax required by law and plaintiff avers that said City of Mobile was a city of more than twenty thousand inhabitants during the year 1903.

Plaintiff avers that the license tax to be paid the said County for engaging in the business aforesaid in towns or cities therein of twenty thousand inhabitants or more after said day and in the year 1903, was fixed at two hundred and fifty dollars in accordance with the law in such cases made and provided; that, prior to said day, said County license tax had been fixed at one hundred dollars for said

year: that defendants, prior to said day, had paid to the plaintiff the sum of one hundred dollars as a county license tax to engage in said business in said City during said year and had taken out such license, that defendants failed to pay said further sum of one hundred and fifty dollars due from them for such County license tax, or any part thereof and that the whole of said one hundred and fifty dollars, and interest thereon, to-wit, the first day of April 1903, is still unpaid and due from defendants to plaintiff.

4 2. The plaintiff claims of the d-fendants, as such partners, the further sum of one hundred and fifty dollars for the balance of county license tax due from them to it on, to-wit, the 4th day of March, 1903, for that they, as such partners, did engage in the business of carrying on and operating a place commonly known as a bucket shop in the City of Mobile in said State after said 4th day of March, without having taken out and paid therefor the County license tax required by law; and plaintiff avers that said City of Mobile was a City of more than twenty thousand inhabitants during the year 1903.

Plaintiff avers that the license tax to be paid to the said County for engaging in the business aforesaid in towns or cities therein of twenty thousand inhabitants or more after said day and in the year 1903, was fixed at two hundred and fifty dollars in accordance with the law in such cases made and provided; that prior to said day, said County license tax had been fixed at one hundred dollars for said year: that defendants prior to said day, had paid to the plaintiff the sum of one hundred dollars as a county license tax to engage in said business in said City during said year and had taken out such license; that defendants have failed to pay said further sum of one hundred and fifty dollars due from them for such county license tax; or any part thereof; and that the whole of said one hundred and fifty dollars, and interest thereon from, to-wit, the first day of April, 1903, is still unpaid and due from defendants to plaintiff.

Plaintiff avers that this action is instituted in its name by the Tax Commissioner of the State of Alabama, duly authorized to bring suit under the provisions of Section 16 of "An Act to provide for the more efficient assessment and collection of taxes in the State of Alabama" approved February 21st, 1899.

R. H. & N. R. CLARKE,
Attorneys for Plaintiff.

Circuit Court, Fall Term, 1903.

THE STATE OF ALABAMA, *Mobile County:*

To any Sheriff of the State of Alabama:

You are hereby commanded forthwith to summon J. H. Ware, Edward F. Leland, Charles W. Lee, and Frank J. Fahey, as partners doing business under the firm name of Ware & Leland, To appear at the next term of the Circuit Court to be held for said

5 County on the 1st Monday in January, 1904 at the place of holding the same, then and there to answer the complaint of Mobile County.

Witness my hand this 23rd, day of November in the year of our Lord, one thousand nine hundred and three.

B. F. JACKSON, *Clerk.*

Acceptance of Service.

I have been employed by the within named defendant to defend this suit for him as his attorney, and I hereby acknowledge for him legal service of the within summons and complaint this 23rd, day of November, 1903. Returnable on second Monday of December 1903.

B. B. BOONE,
Attorney for Defendant.

Pleas for the Defendants.

In the Circuit Court of Mobile County, November Term, 1903.

THE COUNTY OF MOBILE, Plaintiff,
vs.
J. H. WARE ET AL., Defendants.

1. The defendants for answer to the complaint, saith that they are not guilty of the matters alleged therein.

2nd. And for further plea in this behalf, the defendant says, *actio non,* because they say: that they paid the plaintiff the amount due for engaging in the business of buying and selling futures for other persons in the City of Mobile such purchases and sales being made outside of the State of Alabama and did obtain a license so to do prior to the passage of the act of the Legislature of Alabama approved March 1903, fixing said license at five hundred dollars to be paid to the State of Alabama and two hundred and fifty dollars to Mobile County, and that they did engage in and carry on the business they were authorized to do by said license so obtained by them as aforesaid. And the defendants aver that the license so obtained by them has never been revoked or cancelled by the State of Alabama, all of which these defendants are ready and willing to verify etc.

3. And for further plea in this behalf the defendants say, *actio non,* because they say that their agent in the City of Mobile, in the State of Alabama receives orders from the customers of the defendants to buy and sell cotton futures upon the New York Cotton Exchange in the City of New York in the State of New York,
6 said cotton so bought or sold to be received or delivered in said City of New York in the State of New York. Said agent of defendants sending said orders to the defendants in said City of New York by telegraph. And the defendants further aver that said agent of the defendants in the City of Mobile, in the State of Alabama, also receives orders from the customers of the defendants for the purchase and sale of future cotton upon and in the New Orleans Cotton Exchange in the City of New Orleans, in the State of Louisiana. All of

said cotton so bought or sold to be received or delivered in said City of New Orleans, in the State of Louisiana. That the said agent of the defendants in the City of Mobile, in the State of Alabama telegraphs said orders to the agents of the defendants in the City of New Orleans, in the State of Louisiana who executes the same upon and in said Cotton Exchange.

And the defendants aver that their agent in the City of Mobile, in the State of Alabama, receives orders from the customers of said defendants for the sale and purchase of grain, pork and lard upon and in the Chicago Board of Trade in the City of Chicago in the State of Illinois; that said agent of the defendants at Mobile, Ala., telegraphs said orders so received from the customers of the defendants to the defendants at Chicago, in the State of Illinois, where the same are executed by the defendants upon and in said Board of Trade.

And the defendants aver that the places of performance of all of said contracts so entered into by and through defendants for their customers, is in New York, in the State of New York, in the City of Chicago, in the State of Illinois and in the City of New Orleans, in the State of Louisiana. And the defendants further aver that they do no business in the State of Alabama whatever other than receiving from their customers in the City of Mobile, Alabama, through defendants agent, orders as aforesaid, to be executed in the Cities of New York, New York, Chicago Ill and New Orleans, Louisiana. And the defendants aver that the imposition of said license upon the defendants by said act of the Legislature of Alabama, under the facts herein set out is an unlawful interference and regulation of interstate commerce and *and* is in violation of article 1, section VIII, paragraph 3 of the Constitution of the United States.

All of which these defendants are ready and willing to verify, etc.

7 B. B. BOONE,
Attorney for the Defendants.

Filed in office on November 24th, 1903.
B. F. JACKSON, *Clerk.*

Amendment to Pleas.

In Circuit Court of Mobile County, Alabama.

No. 10688.

MOBILE COUNTY, Plaintiff,
vs.
J. H. WARE ET ALS & WARE & LELAND, Defendants.

Come the defendants by their attorney, and, by leave of the Court, amend their pleas heretofore filed in this cause by withdrawing therefrom the second and third of such pleas, and by inserting in the place thereof the following as their second plea:

2. And for further answer to each count of the complaint, defend-

ants say that the only business which they did in this State of Alabama and City of Mobile during the time charged in the complaint was interstate commerce business, and that they could not be required by the State of Alabama or Mobile County in said State to pay a license for doing such business because the levy of such license tax on such business was an unlawful interference with interstate commerce business, and in violation of article 1, section VIII, paragraph 3 of the Constitution of the United States.

B. B. BOONE,
Attorney for Defendants.

Filed in Office March 2nd, 1905.
B. F. JACKSON, *Clerk.*

Order of Adjourned Term.

At a regular term of the Circuit Court of Mobile County, State of Alabama, begun and held in the City of Mobile on the 21st day of November, A. D. 1904, the same being the Fourth Monday after the Fourth Monday in October, A. D. 1904, the Honorable Samuel B. Browne, Judge of the Thirteenth Judicial Circuit of the State of Alabama, Judge, present and presiding; and on the 28th day of January, A. D. 1905, the same being another regular day of said term, it was ordered as follows by the Honorable Samuel B.
8 Browne, Judge presiding, viz:

It appearing to the Court that on account of the great number of cases on the docket there has been a failure to dispose of all the business of this Court; It is therefore ordered and adjudged by the Honorable Samuel B. Browne, the presiding judge of this Court that an adjourned term shall begin instantly upon the expiration of the regular term in such manner that this regular term and the adjourned Term shall operate as one continuous Term, and said Adjourned Term to run from January 28th, 1905 to March 4th, 1905 inclusive; and in order to provide for Jurors to serve at said Adjourned Term, the said presiding Judge directed the box containing the names of Jurors for the Circuit Court, to be brought into Court and ordered the names of 36 persons drawn therefrom to appear on January 31st, 1905 to serve as Jurors for the first week of said Adjourned Term, which was accordingly done, and the Sheriff was ordered to summon the persons so drawn to appear on January 31st, 1905 at 10 o'clock A. M. and it is further ordered that the names of 36 persons be drawn each week of said Adjourned Term from the box containing names of jurors for Circuit Court to serve as Jurors the week following upon which they are drawn.

It is further ordered that the order in which said unfinished business shall be transacted, shall be the trial or other disposition of the cases not tried at this term of Court in the order in which they may be set for trial for said Adjourned Term, and the disposition of such other business as may properly come before the Court.

SAM'L B. BROWNE, *Judge.*

Order Defendants Allowed to Amend Pleas as Filed M'ch 2nd, 1905.

And on the 2nd day of March, A. D. 1905, the same being a regular day of said Adjourned Term, it was ordered as follows in this cause, to-wit:

MOBILE COUNTY
vs.
WARE & LELAND.

Defendant Allowed to Amend Pleas as Filed This Day.

This day came the parties by their attorneys, and this cause coming on to be heard, upon motion of the defendants; It is ordered and adjudged by the Court that the defendants be and they are hereby allowed to amend Pleas as filed this day.

9 *Jury & Verdict for Plaintiff for* $173.00.

And on the 2nd day of March, A. D. 1905, the same being a regular day of said Adjourned Term, it was ordered as follows in this cause, to-wit:

MOBILE COUNTY
vs.
J. H. WARE, EDWARD F. LELAND, CHARLES W. LEE, and FRANK J. FAHEY, as Partners, Doing Business under the Firm Name of Ware & Leland.

Jury and Verdict for the Plaintiff for $173.00.

This day came the parties by their attorneys, and this cause coming on to be heard, and issue having been joined between the Plaintiff and Defendant, thereupon came a jury of good and lawful men, to-wit: J. Martin Smith and eleven others, who having been duly empanneled and sworn according to law, who having heard the evidence and the charge of the Court, upon their oaths do say: "We the jury find for the Plaintiff and assess the damage at $173.00."

It is therefore ordered and adjudged by the Court that the Plaintiff do have and recover of the Defendants the sum of One hundred and seventy-three and 00/100 ($173.00) dollars, the amount of damages as so assessed by the Jury, besides all costs in this behalf expended, for the recovery of which let execution issue.

Order: Defendants Allowed Sixty Days to File Bill of Exceptions.

And on the 2nd day of March, A. D. 1905, the same being a regular day of said Adjourned Term, it was ordered as follows in this cause, to-wit:

MOBILE COUNTY
vs.
WARE & LELAND.

Defendant Allowed Sixty Days from This Date Within Which to File Bill of Exceptions.

This day came the parties by their attorneys, and upon motion of the Defendants; It is ordered and adjudged by the Court that the defendants be and they are hereby allowed sixty days from this date to file bill of exceptions.

10 *Bill of Exceptions.*

In the Circuit Court of Mobile County, State of Alabama.

MOBILE COUNTY
vs.
J. H. WARE ET AL., Defendants.

Be it remembered that upon the trial of this cause in the Circuit Court of Mobile County, Alabama, on the second day of March, 1905, the same being a regular day of an adjourned term of the said court regularly called and held in accordance with the law, the following proceedings were had:—

The following agreed statement of facts were introduced in evidence before the jury:—

Circuit Court, Mobile County.

MOBILE COUNTY, Plaintiff,
vs.
J. H. WARE ET AL. and WARE AND LELAND, Defendants.

In this cause the following statement of facts is agreed upon as evidence in this case.

During the whole of the year 1903, defendants had an office in the City of Mobile, in the County of Mobile and State of Alabama; they also had offices in the City of New York in the State of New York and in the City of New Orleans in the State of Louisiana, and in the City of Chicago in the State of Illinois, each of which officers was connected by private telegraph wires with said Mobile office. Said Mobile Alabama office was in the charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton for future delivery, on commission, for the public generally and for special customers, said business being conducted in the following way and in no other way. They would undertake, through their agent, to buy or sell a cotton future contract for a customer in the Cotton Exchange in New York or in New Orleans as he might

select he making at the time a deposit of money with them as a margin to protect them against loss in making such transaction for him. When the customer gave the order to Ware and Leland either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, but when the transaction was commenced by a purchase or sale of the cotton, Ware and Leland would immediately furnish to the customer a memorandum thereof partly written and partly printed, upon which the following stipulations were printed: "On all marginal business, we reserve the right to close transac-
11 tions without further notice when margins are about exhausted, and to settle contracts in accordance with the rules and customs of the exchange on which the order is placed, it being understood and agreed in all trades that actual delivery is contemplated" and, "All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the exchange on which the order is placed, and the rules, regulations and requirements of the board of managers of said exchange, and all amendments that may be made thereto." Such agent would thereupon transmit such order by their private telegraph line to the defendants' office in the City without the State of Alabama selected for such transaction; that such order would be thereupon *be* executed by defendants by the purchase or sale, as directed of a future cotton contract for such customer in the cotton exchange of the City to which such order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations may be introduced in evidence by defendants in this cause; that said contract would be held by defendants for such customer until he ordered the same closed out, when they would sell or buy another cotton contract against it as might be necessary to cover the same or close it out, or receive or deliver the cotton on said contract. If a profit was made on the transaction, defendants remitted the same to its agent in Mobile, who paid it over to the customer; if a loss was made, it was taken by the agent out of the customers' margin, or, if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customers.

No actual delivery of cotton or grain was ever made on any such contracts, except in a few instances, when such deliveries were made where the contracts were executed, to-wit: in New York, New York, or in New Orleans, Louisiana, or Chicago, Illinois. When any such delivery of cotton was made to defendants for the customer on a purchase by him, it was held by the defendants for account of the customer at the place of delivery, either in New York New York, or in New Orleans Louisiana, until ordered sold by the customer, and was then sold by them there for the account of the cutomer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures made by them for a customer, the cotton was shipped by the customer for whom such

sale was made from Alabama to the place of sale and there delivered through defendants to the buyer.

12 A similar future grain business was done by defendants at their said office in Mobile, Alabama, for customers through their office in Chicago, in the State of Illinois—said orders being executed on the Chicago, Illinois, Board of trade and subject to its rules and regulations, which contemplated and provided for the actual receipt or delivery of grain bought or sold therein—such delivery to be made in Chicago, Illinois.

During the whole of the year 1903 said City of Mobile, Alabama, was a city of more than twenty thousand inhabitants.

Defendant paid to Plaintiff a license tax of one hundred dollars for doing such business in said city for the year 1903, which payment was made prior to the fourth day of March 1903; they have not paid any further license tax to plaintiff for doing such business in said year.

It is agreed between the parties to this cause that if, upon the aforegoing facts and such other evidence as may be introduced, the business so done by defendants was interstate commerce business, and a license tax thereupon would be an unlawful interference with interstate commerce business, and in violation of article 1, section VIII, paragraph 3 of the Constitution of the United States, then defendants are entitled to a verdict.

R. H. & N. R. CLARKE,
Attorneys for Plaintiff.
B. B. BOONE,
Attorney for the Defendants.

Counsel for the plaintiff then admitted in open court before the jury that the rules and regulations of the New York, New York Cotton Exchange, and of the New Orleans, Louisiana Cotton Exchange, and of the Chicago Illinois Board of trade, respectively, provided that contracts executed therein should be in writing: and also provided that in every cotton or grain contract for future delivery executed and entered into in said Exchange or Board of Trade, it should be stipulated agreed and understood that an actual receipt and delivery of the cotton or grain was to be had, and that said contracts were transferable and assignable. This was all the evidence ad-uced upon the trial of this cause.

Thereupon the plaintiff asked the Court to give to the jury the following charge, which said charge was in writing:—

13 No. 1. The Court charges the jury that if they believe the evidence they will find for the plaintiff for the amount claimed in the complaint and interest thereon from the first day of April 1903.

Which said charge next above written the Court gave to the jury and endorsed upon the same in writing: "Given, Saml. B. Browne, Judge."

The defendant then asked the Court to give to the jury the following charge which said charge was in writing:

No. 2. The defendants ask the Court to charge the jury that if they believe the evidence in this cause they must find a verdict for the defendants.

The Court refused to give to the jury the charge next above written and endorsed its refusal upon the said charge in writing in and by the words: "Refused, Sam'l B. Browne, Judge."

And upon the second day of March 1905 the same being the first day mentioned in this bill of exceptions, the Court made and had entered of record in the minutes of said Court an order allowing the defendants sixty days from said date to file a bill of exceptions in this cause, and which is now accordingly done within the time fixed by said order, as witness the signature of the Honorable Sam'l B. Browne hereto affixed this 1st day of May 1905.

SAM'L B. BROWNE,
Judge of the Circuit Court of Mobile County, Alabama.

Filed in office May 1st, 1905.
B. F. JACKSON, *Clerk.*

Appeal Bond.

THE STATE OF ALABAMA, *Mobile County:*

Know all men by these Presents, that we J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey as partners under firm name of Ware & Leland and Ware & Leland and the American Surety Company are held and firmly bound unto Mobile County in the sum of three hundred and fifty six dollars, for the payment of which we jointly and severally bind ourselves, and heirs, executors or administrators, firmly by these presents.

Sealed with our seals, and dated this twenty eighth day of February A. D. 1906.

14 The condition of the above obligation is such, that whereas the above bounden J. H. Ware *et al.* & Ware & Leland *has* this day applied for, and obtained an appeal returnable to the fourth Monday in March, 1906, of the Supreme Court of Alabama, to supersede and reverse a judgment recovered by the said Mobile County against the said J. H. Ware *et al.* and Ware & Leland on the second day of March, 1905, in the Circuit Court of Mobile, for Mobile County, for one hundred and Seventy three Dollars, besides costs.

Now, if the said J. H. Ware *et al.* and Wade & Leland shall prosecute to effect their said suit in the Supreme Court of the State of Alabama, and shall pay and satisfy such judgment, as the Supreme Court shall render in the premises, then this obligation to be null and void, otherwise to be and remain in full force and effect.

AMERICAN SURETY COMPANY,
By L. C. FRY, *V. Prest., Surety.* [SEAL.]
WARE & LELAND. [SEAL.]
J. H. WARE.
EDWARD F. LELAND.
CHARLES W. LEE.
FRANK J. FAHEY. [SEAL.]

In presence of
PALMER PILLANS,
Res. A'nt Sec'y.

Filed 1st day of March, 1906.
S. H. SMITH, *Clerk.*

Citation in Appeal.

Circuit Court.

THE STATE OF ALABAMA, *Mobile County:*

To any Sheriff of Mobile County, Greeting:

Whereas at an Adjourned Term of the Circuit Court of Mobile for Mobile County held from January 28th, 1905, to March 4th, 1905, inclusive on March 2nd, 1905, in a certain cause in said Court wherein Mobile County was plaintiff, and J. H. Ware, Edward F. Leland, Clarkes W. Lee & Frank J. Fahey, as partners doing business under the firm name of Ware & Leland were defendants a judgment was rendered against said J. H. Ware, Edward F. Leland, Charles W. Lee & Frank J. Fahey as partners doing business under the firm name of Ware & Leland to reverse which judgment the said J. H. Ware, Edward F. Leland, Charles W. Lee & Frank J. Fahey, as partners doing business under the firm name of Ware & Leland have on this day applied for and obtained from this office an appeal, returnable to the present Term of our Supreme Court
15 of the State of Alabama being held at Montgomery, to the 26th day of March, 1906, and the necessary bond having been given by the said J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey, as partners doing business under the firm name of Ware & Leland with American Surety Co., as security.

Now you are hereby commanded, without delay, to cite the said Mobile County or R. H. & N. R. Clarke its Attorneys, to appear at the present Term of our said Supreme Court, to defend against the said appeal if they think proper.

Witness, S. H. Smith, Clerk of the Circuit Court of said County this 1st day of March, A. D. 1906.

Attest:

S. H. SMITH, *Clerk.*

Sheriff's Return.

Received March 1st, 1906, and on same day I served a copy of within Citation in Appeal on R. H. Clarke one of the firm of R. H. & N. R. Clarke.

JOHN F. POWERS, *Sheriff,*
By M. I. GOLDSMITH, *D. S.*

Certificate of Appeal.

In the Circuit Court of Mobile County, Ala.

MOBILE COUNTY
vs.
J. H. WARE, EDWARD F. LELAND, CHARLES W. LEE, and FRANK J. FAHEY, as Partners, Doing Business under the Firm Name of Ware & Leland.

I, S. H. Smith, Clerk of the Circuit Court in and for Mobile County, State of Alabama, do hereby certify that in the above entitled cause, a judgment was rendered by the Circuit Court in and for Mobile County, Alabama, in favor of Mobile County, and against J. H. Ware, Edward F. Leland, Charles W. Lee, and Frank J. Fahey, as partners doing business under the firm name of Ware & Leland, on the 2nd day of March, A. D. 1905, for the sum of One hundred and Seventy-three ($173.00) dollars, besides costs of Court, and that on the 1st day of March, A. D. 1906, J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey, as partners doing business under the firm name of Ware & Leland, applied for and took an appeal from said judgment and gave an appeal bond with American Surety Company, as security, which said appeal was made returnable to the present Term of the Supreme Court of the State of Alabama, being held at Montgomery, to the 26th day of March, 1906.

16 Witness my hand this the 24th day of March, A. D. 1906.
Attest: S. H. SMITH, *Clerk.*

Filed in Office March 24th, 1906,
S. H. SMITH, *Clerk.*

Clerk's Certificate to Transcript.

THE STATE OF ALABAMA, *Mobile County:*

I, S. H. Smith, Clerk of the Circuit Court in and for Mobile County, State of Alabama, do hereby certify that the foregoing pages numbered from 1 (one) to 14 (fourteen), both inclusive, contains a full, true and correct Transcript of the Record and Proceedings had in the said Circuit Court, in a certain cause therein lately pending wherein Mobile County was Plaintiff, and J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey as partners doing business under the firm name of Ware & Leland were Defendants, as the same remains of record in my office.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court at office in City of Mobile, this the 24th day of March, A. D. 1906.

S. H. SMITH,
Clerk Circuit Court, Mobile County, Alabama.

17 *Assignment of Error.*

Comes the appellant and says that there is manifest error in the record & hereby assigns the following grounds of error:

1st.

The Court erred in giving to the jury charge No. 1, at the request of the plaintiff. (appellee) Transcript page 11.

2nd.

The Court erred in refusing to give to the jury charge No. 2 at the request of the defendant, (appellant). Transcript, page 11.

B. B. BOONE,
Attorney for the Appellant.

There is no error in the record.

R. H. & N. R. CLARKE,
Att'ys for Appellee.

In this cause it is agreed that the only question for consideration by the appellate court is whether appellants were doing an interstate commerce business, and were thereby exempted from the imposition of a County license tax.

B. B. BOONE,
Attorney for Appellants.
R. H. & N. R. CLARKE,
Attorneys for Appellees.

18 *Orders of the Supreme Court of Alabama.*

(Minutes, Vol. 57, Page 230.)

"SUPREME COURT, TUESDAY, APRIL 3RD, 1906.

The Court met pursuant to adjournment.

Present:
Hon. S. D. Weakley, Chief Justice,
Hon. Jno. R. Tyson, Associate "
Hon. R. T. Simpson, " "
Hon. Jno. C. Anderson, " "

1 Div. 354.

Mobile Circuit Court.

J. H. WARE ET ALS., Partners, &c.,
vs.
MOBILE COUNTY.

Come the parties by attorneys, and submit this cause on briefs for decision.

The Court adjourned until Wednesday, April 4th, 1906, at 10 o'clock A. M.

(Minutes, Vol. 57, Page 337.)

SUPREME COURT, TUESDAY, MAY 8TH, 1906.

The Court met pursuant to adjournment.

Present:
Hon. S. D. Weakley, Chief Justice,
Hon. Jno. R. Tyson, Associate "
Hon. R. T. Simpson, " "
Hon. Jno. C. Anderson, " "

1 Div. 354.

Mobile Circuit Court.

J. H. WARE ET ALS., Partners, &c.,
vs.
MOBILE COUNTY.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellants, J. H. Ware, Edward F. Leland, Charles W. Lee, Frank J. Fahey, Ware & Leland and American Surety Company, sureties on the appeal bond, pay the amount of the judgment of the Circuit Court and ten
19 per centum damages thereon and interest and the costs of appeal of this Court and of the Circuit Court.

The Court adjourned until Wednesday, May 9th, 1906, at 10 o'clock A. M.

20 May 8, 1906.

THE STATE OF ALABAMA, *Judicial Department:*

The Supreme Court of Alabama, November Term, 1905-6.

1 Div. 354.

J. H. WARE ET AL.
vs.
MOBILE COUNTY.

Appeal from Mobile Circuit Court.

TYSON, *J.:*

Subdivision 40 of the Act, "To better provide for the revenue of the state," (General Acts 1903, p. 207) reads as follows: "For each person engaged in the business of buying and selling futures for

speculation or on a commission either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges and sometimes called 'bucket shops,' in towns and cities of twenty thousand inhabitants or more, five hundred dollars; in all other towns and cities, two hundred and fifty dollars; but this shall not be held to legalize any contract which would otherwise be invalid."

It appears from the agreed statement of facts, upon which the case was tried, that during the whole of the year 1903, defendants conducted the business in the city of Mobile, a city of more than twenty thousand inhabitants, of buying and selling cotton for future delivery on commission, for the public generally and for special customers.

21 The local agent in that city would take the order of those desiring to buy or sell future cotton contracts, which would be executed by defendants upon the New York or New Orleans exchange; the customer at the time of giving the order, depositing with the local agent a sum of money as margin to protect the defendants against loss in the event the course of the market was adverse to the side of the customer.

When the order was given it was not usual to say anything about an actual delivery of the cotton, but defendants furnished the customer with a memorandum reserving the right to close the transaction when the margin deposited was about exhausted and to settle the contract in accordance with the rules and customs of the exchange on which the order was placed. This memorandum also contained the stipulation that "in all trades actual delivery is contemplated," and the further stipulation that "all purchases and sales made by *us for you* are made in accordance with and subject to the rules, regulations and contracts of the exchange on which the order is placed," etc., etc.

The order of the customer was then transmitted by wire by defendants to their office in the city of New York or New Orleans where it was executed. The contract thus purchased or sold, as the case may be, was held by defendants for the buyer or seller, their customer, until the same was ordered closed out, which was done by buying or selling another contract against it as might be necessary to cover it or close it out, or receive or deliver cotton on the contract. If a profit was made in the transaction it was remitted by defendants, from the office where made, to the Mobile office and there paid over to the customer; if a loss was incurred, it was taken by the Mobile office out of the customer's margin, and if that was insufficient to pay the loss, the customer was called on for the balance. No actual delivery of cotton was ever made on such contracts, except in a few instances, and then at the place of its execution, to-wit, New York or New Orleans. When the cotton was delivered on a contract of purchase, it was held by defendants for the purchaser, as his agent, until they were ordered to sell it; when the delivery was made upon a contract of sale, the seller would ship the cotton from Alabama to New York or New Orleans, the place of

delivery, and defendants, as his agent, would there deliver it to the buyer.

22 The only question presented for our consideration is, whether the business, thus shown to have been engaged in by defendants, was interstate commerce, and, therefore, not subject to the license tax sought to be collected of them. For clearly if the business is not subject to be taxed, although the one for which defendants are here sought to be made liable may be characterized as an occupation tax, there can be no recovery in this case.—*Stratford v. City Council of Montgomery,* 11 Ala., 619.

But the defendants' business of making contracts of buying and selling future cotton for their customers is not interstate commerce. Indeed, these contracts are not articles of commerce at all.—17 Am. & Eng. Ency. Law, (2nd ed.) p. 61. As was said by the Supreme Court of the United States in *Paul v. Virginia,* (8 Wall. 183) in speaking of policies of insurance: "These contracts are not contracts of commerce in any proper meaning of the word. They are not subject of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different states."—See also *Hooper v. California,* 155 U. S. 648; *N. Y. Life Insu. Co. v. Cravens,* 178 U. S., 389. This principle, we think, clearly controls in this case and its application to the facts makes the defendants liable.

The contracts entered into by defendants for their customers, if discharged by the payment of differences in the market values, though executed in another state by and through their agents, the defendants, are clearly not articles of commerce; and the transaction was not different from one had the customer himself in person executed the order on the exchange in New York or New Orleans. Nor is it of consequence, in so far as the question here is involved, that the contracts were sometimes discharged by the delivery of the cotton. While it is true the cotton may have become an article of inter-state commerce, it never became an article of trade from one state to another until it begun to move and this movement did not begin until the cotton was shipped or was started for transportation from the one state to the other.—*Kidd v. Pearson,* 128 U. S., 25.

23 There is no stipulation shown in the agreed statement of facts which required the seller to ship cotton from any point. He was at liberty to acquire the cotton in the market of delivery or elsewhere; hence, a shipment from one state to another for delivery under the contract would not be inter-state commerce by virtue of the contract, but by the subsequent and independent act of the seller. And the shipment in that event would not become inter-state commerce until the cotton had commenced to be transported.

The case of *Stratford v. City Council, supra,* relied upon by appellants, clearly has no application. In that case Stratford was a broker representing several non-resident wholesale dealers in grain and provisions who lived and carried on their business in other states; and every order for goods from local merchants received or obtained by him was forwarded to his principal, subject to the approval of such principal. And if the order was accepted by the non-resident dealer, he shipped the goods from his place of business to the purchaser who did business in the City of Montgomery.

Affirmed.

Weakley, C. J., Simpson and Anderson, J. J. Concurring.

To be reported.

24 In the Supreme Court of the United States.

WARE AND LELAND ET AL., Plaintiffs in Error,
vs.
MOBILE COUNTY, ALABAMA, Defendant in Error.

I, Robert F. Ligon, Clerk of the Supreme Court of the State of Alabama, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from one to twenty-three, both inclusive, contain a true, full and complete transcript of the records and proceedings had in said Court, in the case of Ware and Leland *et al.*, appellants, *vs.* Mobile County, appellee, (1st Division, No. 354), as the same appear of record and on file in this office.

In testimony whereof, I have hereunto affixed my official signature, as Clerk of the Supreme Court of Alabama, and have caused the Seal of said Supreme Court to be hereunto affixed, at the Capitol, in the City of Montgomery, Alabama, this 26th day of November, 1906.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

25 In the Supreme Court of Alabama. At Law.

Supreme Court of Alabama. Filed Nov. 3, 1906, Rob't F. Ligon, Jr., Clerk.

WARE AND LELAND ET AL., Original Defendants and Appellants,
vs.
MOBILE COUNTY.

Petition for Writ of Error.

And now comes petitioners Ware and Leland *et al.*, the defendants and appellants herein, and say that on or about the 8th day of May

1906 this court entered judgment herein in favor of the plaintiff and appellee, and against these defendants and appellees, and in which judgment and the proceedings had prior thereunto in this case, certain errors were committed to the prejudice of these defendants and appellees, all of which will more in detail appear from the assignment of errors which is filed with this petition.

And these petitioners show that said judgment so rendered on said 8th day of May 1906 by this Court was a final judgment in the highest court of the State of Alabama in which a decision herein could be had, and that said decision and judgment drew into question the validity of an act of the legislature of the State of Alabama, the same being the legislative branch of the government of the State of Alabama, upon the ground of such act or authority being repugnant to the Constitution of the United States, and that the decision herein was in favor of the validity of said act of said legislature of the State of Alabama, and that likewise there was drawn in question a right claimed under the constitution of the United States and that the decision there-in was against the right set up or claimed by these petitioners under the constitution of the United States.

Petitioners show that said questions were specially set up and presented to the State Court wherein said cause originated and
26 in said Supreme Court of Alabama; that said matters were decided by said Supreme Court of Alabama, the highest court in said State, and that the decision thereof was necessary to the judgment rendered herein.

Wherefore these petitioners pray that a writ of error may issue in their behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to said Supreme Court of the United States.

B. B. BOONE,
Attorney for Ware and Leland et al., Petitioners.

27 Supreme Court of Alabama. Filed Nov. 3, 1906. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

MOBILE COUNTY
vs.
WARE AND LELAND ET AL., Original Defendants and Appellants.

This 3rd day of November A. D. 1906, came Ware and Leland a copartnership, and J. H. Ware, E. F. Leland, Charles W. Lee and F. J. Fahey, the appellants in the Supreme Court of Alabama (defendants below) and plaintiffs in error in the Supreme Court of the United States, by their attorney and filed herein and presented to the undersigned Chief Justice of the Supreme Court of Alabama, their petition praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment of the Supreme

Court of Alabama was rendered, duly authenticated, may be sent to the Supreme Court of the United States at the Capitol in Washington, District of Columbia, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the undersigned Samuel D. Weakley, Chief Justice of the Supreme Court of Alabama, does hereby allow the writ of error prayed for upon the said Ware and Leland *et al.* giving bond according to law in the sum of Nine hundred dollars which shall operate as a supersedeas bond.

And I the said Samuel D. Weakley, Chief Justice as aforesaid, do hereby certify that the said Supreme Court of Alabama is the highest court in said State of Alabama having jurisdiction of said case and the questions therein decided, and that said decision and judgment of the Supreme Court of Alabama, to reverse which a writ of error is prayed for by said Ware and Leland *et al.*, drew into question the validity of an act of the legislature of the State
28 of Alabama, the same being the legislative branch of the government of the State of Alabama, upon the ground that such act in so far as it was attempted to be enforced against the appellants was repugnant to the Constitution of the United States, and that the decision of said Supreme Court of Alabama therein was in favor of the validity of said act of the legislature of the State of Alabama; and that likewise said decision and judgment of the Supreme Court of Alabama drew into question a right claimed by said Ware and Leland *et al.* under the Constitution of the United States, and that the decision therein was against the right so set up or claimed by said Ware and Leland *et al.* under the Constitution of the United States; that said matters were decided by said Supreme Court of Alabama, and that the decision thereof was necessary to the judgment of said Supreme Court of Alabama.

Witness my hand and the seal of the Supreme Court of Alabama on the day and year first aforesaid.

SAMUEL D. WEAKLEY,
Chief Justice of the Supreme Court of Alabama.

29 Copy.

In the Supreme Court of Alabama.

MOBILE COUNTY, Original Plaintiff and Appellee,
vs.
WARE AND LELAND, a Copartnership Composed of J. H. Ware, E. F. Leland, Chas. W. Lee, and F. J. Fahey, and J. H. WARE, E. F. LELAND, CHAS. W. LEE, and F. J. FAHEY, as Individuals.

Know all men by these presents, that we, Ware and Leland a copartnership, and J. H. Ware, E. F. Leland, Chas. W. Lee, and F. J. Fahey, and the American Surety Company, as surety, the last named being a corporation, are held and firm bound unto the County of Mobile, Alabama, in the full and just sum of Nine hundred dollars, to be paid to the said County of Mobile, Alabama, its

certain attorneys, or assigns, to which payment, well and truly to be made, we bind ourselves, itself, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of November, 1906.

Whereas, lately in the Supreme Court of Alabama, in a suit pending in said Court wherein the said Mobile County, Alabama, was appellee (and plaintiff in the Circuit Court of Mobile County, Alabama), and the said Ware and Leland *et al.* were appellants (and defendants in the Circuit Court of Mobile County, Alabama), a judgment was rendered against Ware and Leland *et al.*, and the said Ware and Leland *et al.* having obtained a writ of error returnable to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the Supreme Court of Alabama, to reverse the said judgment of the Supreme Court of Alabama in the aforesaid suit, and a citation directed to said Mobile County citing and admonishing it to be and appear before the Supreme Court of the United States within thirty days from the date of said writ of error and said citation.

Now the consideration of the above obligation is such, that if the said Ware and Leland *et al.* shall prosecute said writ of error to effect and answer all damages and costs if they fail to make such plea good, then this obligation to be void; else to remain in full force and virtue.

(Sig.) WARE & LELAND, [SEAL.]
By J. SYD. ROBBINS, *Mgr.* [SEAL.]
J. H. WARE,
By B. B. BOONE, *Att'y.* [SEAL.]
E. F. LELAND,
By B. B. BOONE, *Att'y.* [SEAL.]
F. J. FAHEY,
By B. B. BOONE, *Att'y.* [SEAL.]
CHAS. W. LEE,
By B. B. BOONE. [SEAL.]
AMERICAN SURETY COMPANY,
By L. C. FRY,
Resident Vice-President.

Attest:
PALMER PILLANS,
Res. Ass't Sec'y.

[Seal American Surety Company of New York.]

Filing: Supreme Court of Alabama. Filed Nov. 5, 1906.
ROBT. F. LIGON, JR., *Clerk.*

31 Supreme Court of Alabama. Filed Nov. 5, 1906. Robt. F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama. At Law.

WARE AND LELAND ET AL., Original Defendants and Appellants,
vs.
MOBILE COUNTY.

Assignment of Errors.

The said Ware and Leland, *et al.*, plaintiffs in error, who were appellants in the Supreme Court of Alabama, and defendants in the court of original jurisdiction, in connection with their petition for a writ of error make the following assignment of errors which they aver occurred upon the trial and determination of said cause in the Supreme Court of Alabama.

1. Said Supreme Court of Alabama erred in affirming the judgment of the Circuit Court of Mobile County, which judgment of said Circuit Court was against the said appellants Ware and Leland *et al.*

2. The Supreme Court of Alabama erred in not holding that the defendants and appellants Ware and Leland *et al.* were not liable for the license tax demanded by the appellee and was not guilty of any violation of any valid act of the legislature of the State of Alabama under the facts of this cause.

3. The Supreme Court of Alabama erred in holding that the defendants and appellants Ware and Leland *et al.* under the facts in this cause were carrying on an independent domestic business for which the appellee had the right to require the prepayment of a license tax.

4. The Supreme Court of Alabama erred in holding under the plea of the defendants and appellants filed in the Circuit Court of Mobile County and under the facts in this cause, that the business shown by the facts in support of said plea for the transaction of which a license was demanded in this cause, was inter-state
32 commerce for the transaction of which the appellee had no authority to charge a license.

5. The Supreme Court of Alabama erred in deciding that the Circuit Court of Mobile County properly gave the general affirmed charge for the appellee and that a like charge asked by the appellants was properly refused by said Circuit Court of Mobile County.

6. The Supreme Court of Alabama erred in deciding said appeal pending before it in favor of the appellee and against the appellants, Ware and Leland *et al.* And the said Ware and Leland *et al.*, plaintiffs in error, pray that the Supreme Court of the United States will reverse and annul said judgment of the Supreme Court of Alabama aforesaid.

B. B. BOONE,
Attorney for Ware and Leland et al.

33 Supreme Court of Alabama. Filed Nov. 3, 1906. Robt. F. Ligon, Jr., Clerk.

Writ of Error.

WARE AND LELAND, a Copartnership, J. H. WARE, E. F. LELAND, CHARLES W. LEE, and F. J. FAHEY, as Individuals, Plaintiffs in Error.

vs.

MOBILE COUNTY, Defendant in Error.

The President of the United States to the Honorable the Judges of the Supreme Court of Alabama, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court of Alabama, before you, being the highest court of law or equity in said State in which a decision could be had in a suit between Ware and Leland a corpartnership, and J. H. Ware, E. F. Leland, Charles W. Lee and F. J. Fahey as individuals, as plaintiffs in error (original defendants, and appellants in your Supreme Court of Alabama) and the said Mobile County as defendant in error (original plaintiff and appellee in your said Supreme Court) and wherein judgment was in favor of Mobile County in said Supreme Court of Alabama, on the 8th day of May, 1906, and against the said Ware and Leland *et al.*, in which said suit said Ware and Leland *et al.* relied for their defense upon their plea that a certain act of the legislature of the State of Alabama, the same being the legislative branch of the government of the State of Alabama, and the basis of the demand against the said Ware and Leland *et al.* was invalid as applied to them under this case because repugnant to the Constitution of the United States and the decision of the said Supreme Court of Alabama was in favor of the validity of the said act of said legislature of the State of Alabama, and the further defense that the acts of the said Ware and Leland *et al.* were the exercise of a right claimed under the Constitution of the United States and the decision of the said Supreme Court of Alabama was against the right
34 under the constitution of the United States so set up; all to the great damage of the said Ware and Leland *et al.* as by their complaint appears; and we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties as aforesaid do command you if judgment herein be given, that then, under your seal distinctly and openly, you send the record and the proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington, D. C., within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be

done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of November, in the year of our Lord one thousand nine hundred and six.

[Seal United States Circuit Court, Southern Dis. of Ala.]

RICH'D JONES,
Clerk of the Circuit Court of the United States, Southern District of Alabama.

Allowed by
SAMUEL D. WEAKLEY,
Chief Justice of the Supreme Court of Alabama.

Nov. 3, 1906.

35 Supreme Court of Alabama. Filed Nov. 5, 1906. Robt. F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

WARE AND LELAND ET AL.
vs.
MOBILE COUNTY, Original Plaintiff and Appellee.

To Mobile County, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol in the City of Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the Clerk's office of the Supreme Court of Alabama, wherein Ware and Leland a copartnership, and J. H. Ware, E. F. Leland, Charles W. Lee, and F. J. Fahey as individuals are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered in your favor against the plaintiffs in error, by the Supreme Court of Alabama as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of November, A. D. 1906.

SAMUEL D. WEAKLEY,
Chief Justice of the Supreme Court of Alabama.

Service of this citation is accepted and the receipt of a copy is hereby acknowledged, this 5th day of November, A. D. 1906.

N. R. CLARK,
Attorney for Mobile County.

36 WARE AND LELAND ET AL., Plaintiffs in Error,
vs.
MOBILE COUNTY, ALABAMA, Defendant in Error.

In the Supreme Court of the United tSates.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the records and proceedings in said cause, duly certified and authenticated according to law, to the Honorable the Supreme Court of the United States.

In testimony whereof, I have hereunto affixed my official signature as Clerk of the Supreme Court of Alabama, and have caused the Seal of said Supreme Court to be hereunto affixed, at the Capitol, in the City of Montgomery, Alabama, in the Year of Our Lord, One Thousand, Nine hundred and six, and of the Independence of the United States the One hundred and thirty-first.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 20,490. Alabama supreme court. Term No. 173. Ware & Leland, a copartnership, and J. H. Ware, E. F. Leland, Charles W. Lee, and F. J. Fahey, plaintiffs in error, *vs.* Mobile County. Filed December 18th, 1906. File No. 20,490.

Supreme Court, U. S.
FILED.
JAN 27 1908.
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 173.

WARE & LELAND, Appellants,

VS.

MOBILE COUNTY.

BRIEF OF B. B. BOONE FOR THE APPELLANTS.

PATTERSON, PRINTER, MOBILE.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 173.

WARE & LELAND, Appellants,

VS.

MOBILE COUNTY.

BRIEF OF B. B. BOONE FOR THE APPELLANTS.

STATEMENT OF THE CASE.

These two cases, Nos. 173 and 174, present identically the same facts and questions for decision. These proceedings were commenced in the Circuit Court of Mobile County, State of Alabama, and sought to recover license taxes from the appellants for doing business in the County of Mobile, in the State of Alabama; said licenses taxes being alleged to be due to the State of Alabama, and to Mobile County.

Judgments were rendered in each case in the Circuit Court of Mobile County against the appellants which were affirmed by the Supreme Court of Alabama; writs of error in each case sued out and the case brought to this Court.

The sole question for decision is whether or not the appellants were engaged exclusively in inter-state commerce business and therefore not liable to pay license taxes to the State of Alabama nor to Mobile County.

Both of the cases were tried upon the following agreed statement of facts :

"During the whole of the year of 1903, the defendants had an office in the City of Mobile, in the County of Mobile and State of Alabama ; they also had offices in the City of New York in the State of New York, and in the City of New Orleans in the State of Louisiana, and in the City of Chicago in the State of Illinois, each of which offices were connected by private telegraph wires with said Mobile office. Said Mobile, Alabama, office was in charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton for future delivery, on commission, for the public generally and for special customers, said business being conducted in the following way and in no other. They would undertake through their agent, to buy or sell a cotton future contract for a customer in the Cotton Exchange in New York or in New Orleans as he might select, he making at the time a deposit of money with them as a margin to protect them against loss in making such transaction for him. When the customer gave the order to Ware and Leland either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, but when the the transaction was commenced by a purchase or sale of the cotton, Ware and Leland would immediately furnish to the customer a memorandum thereof partly written and partly printed, upon which the following stipulations were printed : " On all marginal business, we reserve the right to close transactions without further notice when margins are about exhausted and to settle contracts in accordance with the rules and customs of the Exchange on which the order is placed;

it being understood and agreed in all trades that actual delivery is contemplated " and " All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the exchange on which the order is placed, and the rules, regulations and requirements of the board of managers of said exchange, and all amendments that may be made thereto." Such agent would thereupon transmit such order by private telegraph line to the defendants' office in the City without the State of Alabama selected for such transaction ; that such order would be thereupon executed by defendants by the purchase or sale, as directed, of a future cotton contract for such customer in the Cotton Exchange of the city to which such an order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations of such cotton exchange may be introduced in evidence by defendants in this cause ; that such contract would be held by defendants for such customer until he ordered the same closed out, when they would sell or buy another cotton contract against it as might be necessary to cover the same or close it out, or receive and deliver the cotton on said contract. If a profit was made on the transaction, defendants remitted the same to its agent in Mobile, who paid it over to the customer ; if a loss was made, it was taken by the agent out of the customer's margin, or, if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customers. No actual delivery of cotton or grain was ever made on any such contracts, except in a few instances, when such deliveries were made the contracts were executed, to wit, in New York, or in New Orleans, Louisiana, or Chicago, Illinois. When any such delivery of cotton was made to the defendants for the customer on a purchase by him, it was held by the defendants for the account of the customer at the place of delivery, either in New York, New York, or in New

Orleans, Louisiana, until ordered sold by the customer and was then sold by them there for the account of the customer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures by them for a customer, the cotton was shipped by the customer for whom such sale was made from Alabama to the place of sale and there delivered through defendants to the buyer. A similar future grain business was done by defendants at their said office in Mobile, Ala., for customers through their office in Chicago, in the State of Illinois—said orders being executed on the Chicago, Illinois, Board of Trade and subject to its rules and regulations which contemplated and provided for the actual receipt or delivery of grain bought or sold therein—such delivery to be made in Chicago, Illinois, During the whole of the year 1903 said City of Mobile, Alabama, was a city of more than twenty thousand inhabitants. Defendants paid to the plaintiff a license tax of two hundred dollars for doing such business in said city for the year 1903, which payment was made prior to the fourth of March 1903 ; they have not paid any further license tax to plaintiff for doing such business in said year. It is agreed between the parties to this cause that if, upon the foregoing facts and such other evidence as may be introduced, the business so done by the defendants was inter-state commerce business, a license tax thereupon would be an unlawful interference with inter-state commerce business and in violation of Article 1, Section VIII, Paragraph 3 of the Constitution of the United States, then defendants are entitled to a verdict.

R. H. and N. R. CLARKE,
Attorneys for the Plaintiff.
B. B. BOONE,
Attorney for the Defendants.

Counsel for the plaintiff then admitted in open court before the jury that the rules and regulations of the New

York, New York, Cotton Exchange, and of the New Orleans, Louisiana, Cotton Exchange, and of the Chicago, Illinois, Board of Trade, respectively, provided that contracts executed therein should be in writing; and also provided that in every cotton or grain contract for future delivery executed and entered into in said Exchange or Board of Trade, it should be stipulated, agreed and understood that an actual receipt and delivery of the cotton or grain was to be had, and that said contracts were transferable and assignable. This was all the evidence adduced upon the trial of this cause."

Thereupon the plaintiff asked the Court to give to the jury the following charge, which said charge was in writing: No. I. The Court charges the jury that if they believe the evidence they will find for the plaintiff for the amount claimed in the complaint and interest thereon from the first day of April, 1903. Transcript pages 7, 8 and 9.

ARGUMENT.

We insist that the agreed statement of facts above set out show that the business being done and the only business done was the transmission of orders for the sale or purchase of cotton future contracts or grain future contracts by telegraph from Mobile, Alabama, to points without the State of Alabama. That the agent of the appellants at Mobile, Alabama, secured orders from customers of appellants in Mobile, Alabama, and at once telegraphed said orders on to the appellants at New York, New York, New Orleans, Louisiana, or Chicago, Illinois, to be by them executed on the Cotton Exchange of New York, in the State of New York, or in the Cotton Exchange of New Orleans, in the State of Louisiana, or in the Chicago, Illinois, Board of Trade. It has been held by this Court that a telegraph company whose business is in the transmission of messages from one State to another and

which is invested with the powers and privileges conferred by Congress, cannot be forced by the State, as a condition of doing business in its jurisdiction, to pay a license tax, the same being free from the control of State regulations, except such as are strictly of a police character. Leloup vs. Mobile, 127 United States, 640.

We perceive no difference in principle between the business of a telegraph company in sending telegraphic messages from one State to another, and the business of the appellants which consists exclusively in securing, it the business, from citizens of one State and telegraphing it to them in other States. The medium of inter-state communication being the same in each case—the telegraph line. In Western Union Telegraph Company vs. Pendleton, 122 United States, 347, this Court "recognized that the commerce with foreign "countries and among the States which Congress could reg- "ulate as including not only the exchange and transportation "of commodities, or visible, tangible things, but the carriage "of persons, and the transmission by telegraph of ideas, "wishes, orders, and intelligence." Mr. Justice Harlan in Champion vs. Ames, 188 United States, bottom of page 351. says: "In Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 United States, 1, 9, 12, the Court having under consideration the scope of the commerce clause, Chief Justice Waite for the Court said: "Since the case of Gibbons vs. Ogden, 9 Wheaton, 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. * * * * * As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it

has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions."

The appellants were acting as brokers doing business for others for a commission paid to them, by telegraphing orders from one State to another and executing them, and this Court through Mr. Justice Holmes in Hanley vs Kansas City Southern Railroad Company, 187 United States, (bottom of page 619), said: "Transportation (or telepraghing for others we say) as independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." The agreed facts show that when a purchase or sale of cotton or grain was commenced by a purchase or sale, Ware and Leland would immediately furnish to their customer a memorandum thereof partly written and partly printed, upon which the following stipulations were printed: it being understood and agreed in all trades that actual delivery is contemplated." Transcript page 8. Applying the language of Mr. Justice Holmes in Hanley vs. Kansas City Southern Railroad Company, we say that the appellants were engaged solely in an independent business as brokers, telegraphing through their agent at Mobile, Alabama, to them at New York, New Orleans and Chicago, the orders for the purchase and sale of commodities upon the exchanges of those cities, and that whether the citizens giving these orders to the agent of the appellants in Mobile, Alabama, intended to receive or deliver the commodities so sold or purchased for them by Ware and Leland did not prevent such transactions from being inter-state commerce. In the case of Stradford vs. the City Council of Montgomery, 110 Alabama, 619, the Supreme Court of Alabama held, that a license tax imposed by a city upon commercial brokers doing business within the municipality is

not applicable to brokers who represent non-resident principals exclusively; and if so applied that the tax is an invasion of the commerce clause of the Constitution of the United States, and is unconstitutional and void. In the case of Stockard vs. Morgan, 185 United States, 27, this Court through Mr. Justice Peckham held that a privilege tax imposed by a State statute upon residents of that State as merchandise brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the State, as agents for non-resident parties, firms or corporations for goods to be shipped by such non-resident principals to such jobbers or dealers, is an unconstitutional invasion of the commerce clause of the Constitution of the United States, and cites with approval the case of Stratford vs. the City Council of Montgomery, 110 Alabama, 619, saying: "That such a tax amounts to an invasion of the commerce clause of the Constitution of the United States is "held in Stratford vs. the City Council of Montgomery, 110 "Alabama, 619, in a most satisfactory opinion by Chief Justice Brickell. In speaking of the tax under the Alabama "statute, he said, page 628, 'While, as we have shown, the ' "business of the defendant was general, so as to constitute " 'him a broker, it by no means follows that it required that " 'he should take local business. He might, as he did, con- " 'fine himself to inter-state business and still be a "broker" " 'without becoming liable to the tax.' The statute of Ala- "bama is similar to the one in Tennessee, and the facts in "the above case are almost identical with those agreed upon "herein. Although the State has general power to tax in- "dividuals and property within its jurisdiction, yet it has no "power to tax inter-state commerce, even in the person of a "resident of the State."

That the contracts for the purchase and sale of commodities was made by the brokerage firm of Ware and Leland, the plaintiffs in error, through their agent in Mobile,

Alabama, to be executed in cities without the State of Alabama, does not change the character of the commerce. In Rearick vs. Pennsylvania, 203 United States, 507, Mr. Justice Holmes for this Court said at page 511: "If there were "the slightest reason to doubt that the contracts were made "with the company through its authorized agent at the mo- "ment when the orders were given, which we do not per- "ceive that there is, certainly the contrary could not be as- "sumed in order to sustain a conviction. It is for the prose- "cution to make out its case. We may mention here, in "parenthesis, that of course it does not matter to the ques- "tion before us that the contract was made in Pennsylvania. "Brennan vs. Titusville, 153 United States, 289. * * * * " 'Commerce among the several states' is a practical concep- "tion, not drawn from the 'witty diversities' (Yaites vs. "Gough, Yelv., 33), of the law of sales. Swift and Company "vs. the United States, 196 United States, 375. The "brooms were specifically appropriated to spe- "cific contracts, in a practical, if not in a "technical, sense. Under such circumstances it is plain "that, wherever might have been the title, the transport of "brooms for the purpose of fulfilling the contracts was pro- "tected commerce. In Brennan vs. Titusville, supra, pictures "were sold by sample, as the brooms were here, and although "the pictures were consigned to the purchasers directly, the "railroad collecting the price, there was no discussion of the "question whether the title had passed. In American Ex- "press Company vs. Iowa, 196 United States, 133, that ques- "tion was referred to only to be waived. In Caldwell vs. "North Carolina (187 U. S., 622), the pictures were con- "signed to the defendant, an agent, as here, with the addi- "tional facts that the pictures and frames were sent in large "packages, which were opened by the agent on their arrival, "and that the pictures, then for the first time, were put into "their proper frames, and, for all that appears, then for the

"first time appropriated to specific purchasers. In the "Court below all the judges agreed that the title did not "pass until delivery. 127 N. C., 521, 526, 527. This Court "intimated nothing to the contrary. On the special verdict "it well might be that the sale was by sample as in Brennan "vs. Titusville. It was decided that the intervention of an "agent made no difference in the result."

The agreed statement of facts clearly shows, to quote the opinion of the Supreme Court of Alabama in this case, 146 Alabama at page 169, that: "No actual delivery of cot- "ton was ever made on such contracts, except in a few in- "stances, and then at the place of its execution, to-wit, New "York or New Orleans. When the cotton was "delivered on "a contract of purchase, it was held by the defendants for "the purchaser, as his agent, until they were ordered to sell "it; when the delivery was made upon a contract of sale, "the seller would ship the cotton from Alabama to New "York or New Orleans, the place of delivery, and defen- "dants, as his agent, would there deliver it to the buyer." Hence we contend that the record shows that actual transportation of cotton from Alabama to New York and New Orleans grew out of the telegraphic orders sent to the plaintiffs in error at New York and New Orleans by Robbins, their agent in Mobile, Alabama, in fulfilling the contracts made in those cities, just as the brooms were shipped from Ohio to Pennsylvania in the case of Rearick vs. Pennsylvania, supra. It must be remembered that the agreed facts deal with the business done during the year 1903, in Mobile, Alabama, and for the doing of which the license taxes now in question are sought to be enforced. The statute does not attempt to countenance gambling contracts because, as it is set out in the opinion of the Supreme Court of Alabama in this case, 146 Alabama, page 168, it provides, that "this "shall not be held to legalize any contract which would "otherwise be invalid," hence, admitting for the sake of ar-

gument, that those contracts which were entered into in the Cotton Exchanges of New York and New Orleans by plaintiffs in error as brokers representing their principals in Mobile, Alabama, and which were settled without receiving or delivering the cotton were void, then the license operated only upon the valid inter-state business done by the plaintiffs in error.

In the Lottery Case, 188, United States, 321, this Court in an exhaustive opinion delivered by Mr. Justice Harlan held that the carriage of lottery tickets from one State to another by an express company engaged in carrying freight and packages from State to State is inter-state commerce, which Congress under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets to be carried; and as we have heretofore shown in this brief used the following language at page 352: "In "Western Union Telegraph Company vs. Pendleton, 117 "United States, the Court recognized the commerce with "foreign countries and among the States which Congress "could regulate as including not only the exchange and trans- "portation of commodities, or visible, tangible things, but "the carriage of persons, and the transmission by telegraph "of ideas, wishes, orders, and intelligence."

It is a great mistake to suppose that future contracts for the purchase or sale of cotton or grain create no rights of action or are not factors in inter-state commerce because it is well known that many cotton mills throughout the United States meet their wants by purchasing cotton for future delivery on the Cotton Exchanges of New York and New Orleans. The Supreme Court of Alabama in the case of the Western Union Telegraph Company vs. Chamblee, 122 Alabama, at page 436, tersely sustains our argument in these words: "Such contracts, as the authorities generally "concur in holding, are valid, though the vendor neither has "the goods in hand, nor has contracted for the purchase of

"them, and has no expectation of acquiring them otherwise "than by their purchase at some date before the day of de- "livery."

It will be observed that the agreed facts show when a purchase or sale of a cotton or grain future contract was begun that the agent of the plaintiffs in error, in Mobile, Alabama, one Robbins, at once gave to the customer a memorandum containing the stipulations that "in all trades actual delivery is contemplated," and that "all purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and contracts of the exchange on which the order is placed, etc." We contend that there is no evidence in the record to show that the agent of the plaintiffs in error knew when the commodities were bought and sold that the purchasers or sellers did not intend to receive or deliver the same according to their contracts. "If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal." Mr. Justice Harlan in Embry vs. Jamison, 131 United States, at page 346, quoting from Story vs. Salomon, 71 New York, 420, 422.

All agree that the Congress of the United States has power to regulate or prohibit the making of future contracts by telegraph from one State to another, under the commerce clause of the Constitution of the United States. In 1893 Mr. Hatch, of Missouri, introduced such a bill in the House of Representatives, and during the present session of Congress Mr. Burleson, of Texas, introduced a similar bill. The Court will take judicial knowledge of these measures, the last of which is based upon the decision of this Court in the Lottery Case, 188 United States, 321. Upon the facts found in the transcript of the record and the law applicable thereto it seems to us plain that the license tax in question sought

to be collected from the plaintiffs in error is a burden upon and a regulation of inter-state commerce, and in conflict with Article 1, Section VIII., paragraph 3, of the Constitution of the United States, and that the judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

BURWELL BOYKIN BOONE,

Counsel for Plaintiffs in Error.

(20,491.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 174.

WARE AND LELAND, A CORPORATION, AND J. H. WARE, E. F. LELAND, CHARLES W. LEE, AND F. J. FAHEY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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1 & 2 (Title Page.)

1 Div. 355.

Supreme Court of Alabama.

Filed Apr. 3, 1906. Rob't F. Ligon, Jr., Clerk.

J. H. WARE ET ALS., Partners, &c.,
vs.
THE STATE OF ALABAMA.

Appeal from Mobile Circuit Court.

April 3, 1906, submitted on briefs.
May 8, 1906, Affirmed, upon the authority of Ware *et al. vs.* Mobile County, decided at this term.
Weakley, C. J., Tyson & Simpson, JJ., concurring.

3 A Transcript of the Record and Proceedings had in a Certain Cause Pending in the Circuit Court of Mobile County, Alabama, Therein Lately Pending Wherein the State of Alabama, was Plaintiff and J. H. Ware, Edward F. Leland, Charles W. Lee, and Frank J. Fahey, as Partners, Doing Business under the Firm Name of Ware and Leland were Defendants.

Complaint and Summons.

In the Circuit Court of Mobile County, Alabama, Fall Term, 1903.

THE STATE OF ALABAMA, Plaintiff,
vs.
J. H. WARE, EDWARD F. LELAND, CHARLES W. LEE, and FRANK J. FAHEY, as Partners, Doing Business under the Firm Name of Ware & Leland, Defendants.

1. The plaintiff claims of the defendants, as partners doing business under the firm name of Ware & Leland, three hundred dollars for the balance of State license tax due from them to it, on to-wit the 4th day of March, 1903, for that they, as such partners, did engage in the business of buying and selling futures on a commission for other persons, in the City of Mobile in said State after said 4th day of March, without having taken out and paid therefor the license tax required by law: and plaintiff avers that said City of Mobile was a City of more than twenty thousand inhabitants during the year 1903.

Plaintiff avers that the license tax to be paid the State for engaging in the business aforesaid in towns or cities therein of twenty thousand inhabitants or more after said day and in the year

1903, was fixed at five hundred dollars by an act of the Legislature of the State of Alabama approved on said day; that, prior to said day, said license tax had been fixed by law at two hundred dollars for said year; that the defendants prior to said day, had paid to plaintiff the sum of two hundred dollars for a license to engage in said business in said City during said year and had taken out such license; that defendants have failed to pay said further sum of three hundred dollars due from them for such license, or any part
4 thereof; and that the whole of said three hundred dollars, and interest thereon from, to-wit, the first day of April, 1903, is still unpaid and due from defendants to plaintiff.

2. The plaintiff claims of the defendant the further sum of three hundred dollars for the balance of State license tax due from them to it on, to-wit, the 4th day of March, 1903, for that they, as such partners did engage in the business of carrying on and operating a place commonly known as a bucket shop in the City of Mobile in said State after said 4th day of March, without having taken out and paid therefor the license tax required by law; and plaintiff avers that said City of Mobile was a city of more than twenty thousand inhabitants during the year 1903.

Plaintiff avers that the license tax to be paid the State for engaging in the business aforesaid in towns or cities therein of twenty thousand inhabitants or more after said day and in the year 1903, was fixed at five hundred dollars by an act of the legislature of the State of Alabama approved on said day; that, prior to said day, said license tax had been fixed by law at two hundred dollars for said year: that the defendants prior to said day, had paid to plaintiff the sum of two hundred dollars for a license to engage in said business in said City during said year and had taken out such license; that defendants have failed to pay said further sum of three hundred dollars due from them for such license, and any part thereof, and that the whole of said three hundred dollars, and interest thereof from, to-wit, the first day of April, 1903, is still unpaid and due from defendants to plaintiff.

Plaintiff avers that this action is instituted in its name by the Tax Commissioner of the State of Alabama, duly authorized to bring suit under the provisions of Section 16 of "An Act to provide for the more efficient assessment and collection of taxes in the State of Alabama" approved February 21st, 1899.

R. H. & N. R. CLARKE,
Attorneys for Plaintiff.

Circuit Court, Fall Term, 1903.

THE STATE OF ALABAMA, *Mobile County:*

To any Sheriff of the State of Alabama:

You are hereby commanded forthwith to summon J. H. Ware, Edward F. Leland, Charles W. Lee, and Frank J. Fahey, as partners doing business under the firm name of Ware & Leland, To appear

at the next term of the Circuit Court to be held for said
5 County on the 1st Monday in January, 1904 at the place of holding the same, then and there to answer the complaint of the State of Alabama.

Witness my hand this 23rd, day of November in the year of our Lord, one thousand nine hundred and three.

B. F. JACKSON, *Clerk.*

I have been employed by the within named defendants to defend this suit for them as their attorney, and I hereby acknowledge for them legal service of the within summons and complaint this 23rd, day of November, 1903. Returnable on second Monday of December, 1903.

B. B. BOONE,
Attorney for Defendant-.

Pleas of Defendants.

In the Circuit Court of Mobile County, November Term, 1903.

THE STATE OF ALABAMA, Plaintiff,
vs.
J. H. WARE ET AL., Defendants.

1. The defendants for answer to the complaint, saith that they are not guilty of the matters alleged therein.

2. And for further plea in this behalf, the defendants say, *actio non*, because they say: that they paid the plaintiff the amount due for engaging in the business of buying and selling futures for other persons in the City of Mobile such purchases and sales being made outside of the State of Alabama and did obtain a license so to do prior to the passage of the act of the Legislature of Alabama approved March 4th, 1903, fixing said license at five hundred dollars to be paid to the State of Alabama and two hundred and fifty dollars to Mobile County, and that they did engage in and carry on the business they were authorized to do by said license so obtained by them as aforesaid. And the defendants aver that the license so obtained by them has never been revoked or cancelled by the State of Alabama, all of which these defendants are ready and willing to certify etc.

3. And for further plea in this behalf the defendants say, *actio non*, because they say that their agent in the City of Mobile, in the State of Alabama receives orders from the customers of the defendants to buy and sell cotton futures upon the New York Cotton Ex-
change in the City of New York in the State of New York,
6 said cotton so bought or sold to be received or delivered in said City of New York in the State of New York. Said agent of defendants sending said orders to the defendants in said City of New York by telegraph. And the defendants further aver that said agent of the defendants in the City of Mobile, in the State of Alabama, also receives orders from the customers of the defendants for the purchase

and sale of future cotton upon and in the New Orleans Cotton Exchange in the City of New Orleans, in the State of Louisiana. All of said cotton so bought or sold to be received or delivered in said City of New Orleans, in the State of Louisiana. That the said agent of the defendants in the City of Mobile, in the State of Alabama telegraphs said orders to the agents of the defendants in the City of New Orleans, in the State of Louisiana who executes the same upon and in said Cotton Exchange.

And the defendants aver that their agent in the City of Mobile, in the State of Alabama, receives orders from the customers of said defendants for the sale and purchase of grain, pork and lard upon and in the Chicago Board of Trade in the City of Chicago in the State of Illinois; that said agent of the defendants at Mobile, Ala., telegraphs said orders so received from the customers of the defendants to the defendants at Chicago, in the State of Illinois, where the same are executed by the defendants upon and in said Board of Trade.

And the defendants aver that the places of performance of all of said contracts so entered into by and through defendants for their customers, is in New York City, in the State of New York, in the City of Chicago, in the State of Illinois and in the City of New Orleans, in the State of Louisiana. And the defendants further aver that they do no business in the State of Alabama whatever other than receiving from their customers in the City of Mobile, Alabama, through defendants' agent, orders as aforesaid, to be executed in the Cities of New York, New York, Chicago, Ill., and New Orleans, Louisiana. And the defendants aver that the imposition of said license upon the defendants by said act of the Legislature of Alabama, under the facts herein set out is an unlawful interference and regulation of interstate commerce and is in violation of article 1, section VIII, paragraph 3 of the Constitution of the United States.

All of which these defendants are ready and willing to verify, etc.

7

B. B. BOONE,
Attorney for the Defendants.

Filed in office on November 24th, 1903.
B. F. JACKSON, *Clerk.*

Amendment to Pleas.

In Circuit Court of Mobile County, Alabama.

THE STATE OF ALABAMA, Plaintiff,
vs.
J. H. WARE & WARE & LELAND, Defendants.

Come the defendants by their attorney, and, by leave of the Court, amend their pleas heretofore filed in this cause by withdrawing therefrom the second and third of such pleas, and by inserting in *in* the place thereof the following as their second plea:

2. And for further answer to each count of the complaint, defend-

ants say that the only business which they did in this State of Alabama and City of Mobile during the time charged in the complaint was interstate commerce business, and that they could not be required by the State of Alabama to pay a license for doing such business because the levy of such license tax on such business was an unlawful interference with interstate commerce business, and in violation of article 1, section VIII, paragraph 3 of the Constitution of the United States.

B. B. BOONE,
Attorney for Defendants.

Filed in Office March 2nd, 1905.
B. F. JACKSON, *Clerk.*

Order of Adjourned Term.

At a regular term of the Circuit Court of Mobile County, State of Alabama, begun and held in the City of Mobile on the 21st day of November, A. D. 1904, the same being the Fourth Monday after the Fourth Monday in October, A. D. 1904, the Honorable Samuel B. Browne, Judge of the Thirteenth Judicial Circuit of the State of Alabama, Judge, present and presiding; and on the 28th day of January, A. D. 1905, the same being another regular day of said term, it was ordered as follows by the Honorable Samuel B. Browne, Judge presiding, viz:

8 It appearing to the Court that on account of the great number of cases on the docket there has been a failure to dispose of all the business of this Court; It is therefore ordered and adjudged by the Hon. Samuel B. Browne, the presiding judge of this Court that an adjourned term shall begin instantly upon the expiration of the regular term in such manner that this regular term and the adjourned term shall operate as one continuous term, and said adjourned Term to run from January 28th, 1905 to March 4th, 1905, inclusive; and in order to provide for jurors to serve at said adjourned term, the said presiding judge directed the box containing the names of jurors for the Circuit Court, to be brought into Court and ordered the name- of 36 persons drawn therefrom to appear on January 31st, 1905 to serve as Jurors for the first week of said Adjourned Term, which was accordingly done, and the Sheriff was ordered to summon the persons so drawn to appear on January 31st 1905 at 10 o'clock A. M. and it is further ordered that the name- of 36 persons be drawn each week of said adjourned Term from the box containing names of jurors for Circuit Court to serve as Jurors the week following upon which they are drawn.

It is further ordered that the order in which the said unfinished business shall be transacted, shall be the trial or other disposition of the cases not tried at this term of Court in the order in which they may be set for trial for said adjourned Term, and the disposition of such other business as may properly come before the Court.

SAM'L B. BROWNE, *Judge.*

Order Defendants Allowed to Amend Pleas as Filed This Day.

And on the 2nd day of March, A. D. 1905, the same being another regular day of said Adjourned Term, it is ordered as follows in this cause, to-wit:

THE STATE OF ALABAMA
vs.
WARE & LELAND.

Def'ts Allowed to Amend Pleas as Filed This Day.

This day came the parties by their attorneys, and this cause coming on to be heard, upon motion of the defendants; it is ordered
9 and adjudged by the Court that the defendants be and they are hereby allowed to amend pleas as filed this day.

Jury and Verdict for Plaintiff for $346.00.

And on the 2nd day of March 1905, the same being a regular day of said Adjourned Term, it was ordered as follows in this cause, to-wit:—

THE STATE OF ALABAMA
vs.
J. H. WARE, EDWARD F. LELAND, CHARLES W. LEE, and FRANK J. FAHEY, as Partners, Doing Business under the Firm Name of Ware & Leland.

Jury and Verdict for Plaintiff for $346.00.

This day came the parties by their Attorneys, and issue having been joined between the Plaintiff and defendants, thereupon came a jury of good and lawful men to-wit: J. Martin Smith and eleven others, who having been duly empanneled and sworn according to law, who having heard the evidence and the charge of the Court upon their oaths do say: "We the jury find for the plaintiff and assess the damages at $346.00."

It is therefore ordered and adjudged by the Court that the Plaintiff do have and recover of the Defendants the Sum of Three hundred and forty six and 00/100 Dollars ($346.00) the amount of damages as so assessed by the Jury besides all costs in this behalf expended, for the recovery of which let execution issue.

Order: Defendants Allowed Sixty Days to File Bill of Exceptions.

And on the 2nd day of March, A. D. 1905, the same being a regular day of said Adjourned Term, it was ordered as follows in this cause, to-wit:

THE STATE OF ALABAMA
vs.
WARE & LELAND.

Defendants Allowed Sixty Days from This Day in Which to File Bill of Exceptions.

This day came the parties by their Attorneys, and upon motion of the defendants; It is ordered and adjudged by the Court that the Defendants be and they are hereby allowed sixty days from this day to file bill of exceptions.

10 *Bill of Exceptions.*

In the Circuit Court of Mobile County, State of Alabama.

THE STATE OF ALABAMA
vs.
J. H. WARE ET AL., Defendants.

Be it remembered that upon the trial of this cause in the Circuit Court of Mobile County, Alabama, on the second day of March, 1905, the same being a regular day of an Adjourned Term of the said Court regularly called and held in accordance with law, the following proceedings were had:

The following agreed statement of facts was introduced in evidence before the jury:—

Circuit Court, Mobile County, Ala.

THE STATE OF ALABAMA, Plaintiff,
vs.
J. H. WARE ET AL. and WARE & LELAND, Defendants.

In this cause the following statement of facts is agreed upon as evidence in this cause.

During the whole of the year 1903, defendants had an office in the City of Mobile, in the County of Mobile and State of Alabama; they also had offices in the City of New York in the State of New York, and in the City of New Orleans in the State of Louisiana, and in the City of Chicago in the State of Illinois, each of which offices was connected by private telegraph wires with said Mobile office. Said Mobile Alabama office was in the charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton for future delivery, on commission, for the public generally and for special customers, said business being conducted in the following way and in no other. They would undertake, through their agent, to buy or sell a cotton future contract for a customer in the

Cotton Exchange in New York or in New Orleans as he might select, he making at the time a deposit of money with them as a margin to protect them against loss in making such transaction for him. When the customer gave the order to Ware & Leland either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, but when the transaction was commenced by a purchase or sale of the cotton, Ware & Leland would immediately furnish to the customer a memorandum thereof partly written and partly printed, upon which the following stipulations were printed: "On all marginal business, we reserve the right to close transac-
11 tions without further notice when margins are about exhausted, and to settle contracts in accordance with the rules and customs of the exchange on which the order is placed, it being understood and agreed in all trades that actual delivery is contemplated" and, "All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the exchange on which the order is placed, and the rules, regulations and requirements of the board of managers of said exchange, and all amendments that may be made thereto." Such agent would thereupon transmit such order by private telegraph line to the defendants' office in the City without the State of Alabama selected for such transaction; that such order would be thereupon *be* executed by defendants by the purchase or sale, as directed, of a future cotton contract for such customer in the cotton exchange of the City to which such order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations may be introduced in evidence by defendants in this cause; that said contract would be held by defendants for such customer until he ordered the same closed out, when they would sell or buy another cotton contract against it as might be necessary to cover the same or close it out, or receive or deliver the cotton on said contract. If a profit was made on the transaction, defendants remitted the same to its agents in Mobile, who paid it over to the customer; if a loss was made, it was taken by the agent out of the customers' margin, or, if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customers.

No actual delivery of cotton or grain was ever made on any such contracts, except in a few instances, when such deliveries were made the contracts were executed, to-wit, in New York, or in New Orleans, Louisiana, or Chicago, Illinois. When any such delivery of cotton was made to defendants for the customer on a purchase by him, it was held by the defendants for account of the customer at the place of delivery, either in New York, New York, or in New Orleans, Louisiana, until ordered sold by the customer and was then sold by them there for the account of the customer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures made by them for a customer, the cotton was shipped by the customer for whom such sale was made

from Alabama to the place of sale and there delivered through defendants to the buyer.

12 A similar future grain business was done by defendants at their said office in Mobile, Alabama, for customers through their office in Chicago, in the State of Illinois—said orders being executed on the Chicago, Illinois, Board of Trade and subject to its rules and regulations, which contemplated and provided for the actual receipt or delivery of grain bought or sold therein—such delivery to be made in Chicago, Illinois.

During the whole of the year 1903 said City of Mobile, Alabama, was a city of more than twenty thousand inhabitants.

Defendants paid to plaintiff a license tax of two hundred dollars for doing such business in said city for the year 1903 which payment was made prior to the fourth of March, 1903; they have not paid any further license tax to plaintiff for doing such business in said year.

It is agreed between the parties to this cause that if, upon the aforegoing facts and such other evidence as may be introduced, the business so done by defendants was interstate commerce business, and a license tax thereupon would be an unlawful interference with interstate commerce business and in violation of article 1, section VIII, paragraph 3 of the Constitution of the United States, then defendants are entitled to a verdict.

R. H. & N. R. CLARKE,
Attorneys for Plaintiff.
B. B. BOONE,
Attorney for the Defendants.

Counsel for plaintiff then admitted in open court before the jury that the rules and regulations of the New York, New York Cotton Exchange, and of the New Orleans, Louisiana Cotton Exchange, and of the Chicago, Illinois, Board of Trade, respectively, provided that contracts executed therein should be in writing; and also provided that in every cotton or grain contract for future delivery executed and entered into in said exchange or Board of Trade, it should be stipulated agreed and understood that an actual receipt and delivery of the cotton or grain was to be had, and that said contracts were transferable and assignable. This was all the evidence adduced upon the trial of this cause.

Thereupon the plaintiff asked the Court to give to the jury
13 the following charge, which said charge was in writing:

No. 1. The Court charges the jury that if they believe the evidence they will find for the plaintiff for the amount claimed in the complaint and interest thereon from the first day of April, 1903.

Which said charge next above written the Court gave to the jury and endorsed upon the same in writing: "Given, Saml. B. Browne, Judge."

The defendant then asked the Court to give to the jury the following charge which said charge was in writing:

No. 2. The defendants ask the Court to charge the jury that if they believe the evidence in this case they must find a verdict for the defendants.

The Court refused to give to the jury the charge next above written and endorsed its refusal upon the said charge in writing in and by the words: "Refused, Sam'l B. Browne, Judge."

And upon the 2nd day of March, 1905, being the same day mentioned in this bill of exceptions, the Court made and had entered of record in the minutes of said Court an order allowing the defendants sixty days from said date to file a bill of exceptions in this case, and which is now accordingly done within the time fixed by said order, was witness the signature of the Honorable Sam'l B. Browne hereto affixed this 1st day of May 1905.

SAM'L B. BROWNE,
Judge Circuit Court of Mobile County, Alabama.

Filed in office May 1st, 1905.
B. F. JACKSON, *Clerk.*

Appeal Bond.

THE STATE OF ALABAMA, *Mobile County:*

Know all men by these presents, that we J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey as partners doing business under the firm name of Ware & Leland and Ware and Leland and the American Surety Company are held and firmly bound unto the State of Alabama in the sum of six hundred & ninety
14 two dollars, for the payment of which, we jointly and severally bind ourselves, and heirs, executors or administrators firmly by these presents.

Sealed with our seals, and dated this twenty-eighth day of February, A. D. 1906:

The condition of the above obligation is such, That whereas the above bounden J. H. Ware *et al.* & Ware Leland have this day applied for, and obtained an appeal returnable to the 4th Monday in March, 1906, of the Supreme Court of Alabama to Supersede and reverse a judgment recovered by the State of Alabama against the said J. H. Ware *et al.* & Ware & Leland on the 2nd day of March, 1905, in the Circuit Court of Mobile County, for three hundred and forty-six dollars, besides costs.

Now if the said J. H. Ware *et al.* & Ware & Leland shall prosecute to effect their said suit in the Supreme Court of the State of Alabama, shall pay and satisfy such judgment, as the Supreme Court shall render in the premises, then this obligation to be null and void, otherwise to be and remain in full force and effect.

AMERICAN SURETY CO.,
By L. C. FRY, [SEAL.]
Resident V. Prest., Surety.
WARE & LELAND. [SEAL.]
J. H. WARE.
EDWARD F. LELAND.
CHARLES W. LEE.
FRANK J. FAHEY. [SEAL.]

In presence of
PALMER PILLANS,
Res. A'nt Sec'y.

Filed 1st day of March 1906

Citation in Appeal.

Circuit Court.

THE STATE OF ALABAMA, *Mobile County:*

To the Sheriff of Mobile County, Greeting:

Whereas at an Adjourned Term of the Circuit Court of Mobile for Mobile County held from January 25th, 1905, to March 4th, 1905, inclusive on March 2nd, 1905, in a certain cause in said Court wherein the State of Alabama was plaintiff and J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey, as partners doing business under the firm name of Ware & Leland were defendants a judgment was rendered against said J. H. Ware, Edward F. Leland, Charles W. Lee & Frank J. Fahey as partners doing busi-
15 ness under the firm name of Ware & Leland to reverse which judgment the said J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey, as partners doing business under the firm name of Ware & Leland have on this day applied for and obtained from this office an appeal returnable to the present Term of our Supreme Court of the State of Alabama being held at Montgomery to the 26th day of March, 1906, and the necessary bond having been given by the said J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey as partners doing business under the firm name of Ware & Leland with American Surety Co., as security.

Now, you are hereby commanded, without delay, to cite the said The State of Alabama or R. H. & N. R. Clarke its Attorneys, to appear at the present term of our said Supreme Court, to defend against said appeal if they think proper.

Witness, S. H. Smith, Clerk of the Circuit Court of said County this 1st day of March, A. D. 1906.

Attest:

S. H. SMITH, *Clerk.*

Sheriff's Return.

Received March 1st, 1906, and on same day I served a copy of within Citation in Appeal on R. H. Clarke one of the firm of R. H. & N. R. Clarke.

JOHN F. POWERS, *Sheriff,*
By M. I. GOLDSMITH, *D. S.*

Certificate of Appeal.

In the Circuit Court of Mobile County, Alabama.

THE STATE OF ALABAMA
vs.
J. H. WARE, EDWARD F. LELAND, CHARLES W. LEE, and FRANK J. FAHEY, as Partners, Doing Business under the Firm Name of Ware & Leland.

I, S. H. Smith, Clerk of the Circuit Court in and for Mobile County, State of Alabama, do hereby certify that in the above entitled cause, a judgment was rendered by the Circuit Court in and for Mobile County, State of Alabama, in favor of the State of Alabama, and against J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey as partners doing business under the firm name of Ware & Leland, on the 2nd day of March, A. D. 1905, for the sum of Three Hundred and Forty-six and 00/100 ($346.00) Dollars, besides costs Court, and that on the 1st day of March,
16 A. D. 1906, J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey as partners doing business under the firm name of Ware & Leland, applied for and took an appeal from said judgment, and gave an Appeal Bond with American Surety Co., as security, which said appeal was made returnable to the present Term of the Supreme Court of the State of Alabama, being held at Montgomery, to the 26th day of March, A. D. 1906.

Witness my hand this the 24th day of March, A. D. 1906.

Attest: S. H. SMITH, *Clerk.*

Filed in Office March 24th 1906.
S. H. SMITH, *Clerk.*

Clerk's Certificate to Transcript.

THE STATE OF ALABAMA, *Mobile County:*

I, S. H. Smith, Clerk of the Circuit Court in and for Mobile County, State of Alabama, do hereby certify that the foregoing pages numbered from 1 (one) to 14 (fourteen), both inclusive, contains a full, true and correct Transcript of the Record and Proceedings had in the said Circuit Court, in a certain cause therein lately pending wherein The State of Alabama was Plaintiff, and J. H. Ware, Edward F. Leland, Charles W. Lee and Frank J. Fahey as partners doing business under the firm name of Ware & Leland were Defendants, as the same remains of record in my office.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court at office in City of Mobile, this the 24th day of March, A. D. 1906.

S. H. SMITH,
Clerk Circuit Court, Mobile County, Alabama.

17 *Assignment of Error.*

Comes the appellant & says that there is manifest error in the record and hereby assigns the following grounds of error:

1st.

The Court erred in giving to the jury charge No. 1, at the request of the plaintiff (appellee) Transcript page 11.

2nd.

The Court erred in refusing to give to the jury charge No. 2 at the request of the defendant. (appellant) Transcript, page 11.

B. B. BOONE,
Attorney for the Appellant.

There is no error in the record.

R. H. & N. R. CLARKE,
Att'ys for Appellee.

In this cause it is agreed that the only question for consideration by the appellate court is whether appellants were doing an interstate commerce business, and were thereby exempted from the imposition of a state license tax.

B. B. BOONE,
Attorney for Appellants.
R. H. & N. R. CLARKE,
Attorneys for Appellees.

18 *Orders of the Supreme Court of Alabama.*

(Minutes, Vol. 57, Page 230.)

"SUPREME COURT, TUESDAY, *April 3rd*, 190

The Court met pursuant to adjournment.
Present:
Hon. S. D. Weakley, Chief Justice,
Hon. Jno. R. Tyson, Associate "
Hon. R. T. Simpson, " "
Hon. Jno. C. Anderson, " "

1 Div., 355.

Mobile Circuit Court.

J. H. WARE ET ALS., Partners, &c.,
vs.
THE STATE OF ALABAMA.

Come the parties by attorneys, and submit this cause on briefs for decision.

The Court adjourned until Wednesday, April 4th, 1906, at 10 o'clock A. M.

(Minutes, Vol. 57, Page 337.)

SUPREME COURT, TUESDAY, *May 8th*, 1906.

The Court met pursuant to adjournment.
Present:
Hon. S. D. Weakley, Chief Justice,
Hon. Jno. R. Tyson, Associate "
Hon. R. T. Simpson, " "
Hon. Jno. C. Anderson, " "

1 Div., 355.

Mobile Circuit Court.

J. H. WARE ET ALS., Partners, &c.,
vs.
THE STATE OF ALABAMA.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellants, J. H. Ware, Edward F. Leland, Charles W. Lee, Frank J. Fahey, Ware & Leland and American Surety Company, sureties on the appeal bond, pay the amount of the judgment of the Circuit Court and ten
19 per centum damages thereon and interest and the costs of appeal of this Court and of the Circuit Court.
The Court adjourned until Wednesday, May 9th, 1906, at 10 o'clock A. M.

20 May 8, 1906.

(Upon authority of which, this case, Ware & Leland *et al.* & State of Alabama, is decided. See such endorsement on title page hereof.)

THE STATE OF ALABAMA, *Judicial Department:*

The Supreme Court of Alabama, November Term, 1905-6.

1 Div., 354.

J. H. WARE ET AL.
v.
MOBILE COUNTY.

Appeal from Mobile Circuit Court.

TYSON, *J.:*

Subdivision 40 of the Act, "To better provide for the revenue of the state," (General Acts 1903, p. 207) reads as follows: "For each

person engaged in the business of buying and selling futures for speculation or on a commission either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges and sometimes called 'bucket shops,' in towns and cities of twenty thousand inhabitants or more, five hundred dollars; in all other towns and cities, two hundred and fifty dollars; but this shall not be held to legalize any contract which would otherwise be invalid."

It appears from the agreed statement of facts, upon which the case was tried, that during the whole of the year 1903, defendants conducted the business in the city of Mobile, a city of more than twenty thousand inhabitants, of buying and selling cotton for future delivery on commission, for the public generally and for special customers.

21 The local agent in that city would take the order of those desiring to buy or sell future cotton contracts, which would be executed by defendants upon the New York or New Orleans exchange; the customer at the time of giving the order, depositing with the local agent a sum of money as margin to protect the defendants against loss in the event the course of the market was adverse to the side of the customer.

When the order was given it was not usual to say anything about an actual delivery of the cotton, but defendants furnished the customer with a memorandum reserving the right to close the transaction when the margin deposited was about exhausted and to settle the contract in accordance with the rules and customs of the exchange on which the order was placed. This memorandum also contained the stipulation that "in all trades actual delivery is contemplated," and the further stipulation that "all purchases and sales made by *us for you* are made in accordance with and subject to the rules, regulations and contracts of the exchange on which the order is placed," etc., etc.

The order of the customer was then transmitted by wire by defendants to their office in the city of New York or New Orleans where it was executed. The contract thus purchased or sold, as the case may be, was held by defendants for the buyer or seller, their customer, until the same was ordered closed out, which was done by buying or selling another contract against it as might be necessary to cover it or close it out, or receive or deliver cotton on the contract. If a profit was made in the transaction it was remitted by defendants, from the office where made, to the Mobile office and there paid over to the customer; if a loss was incurred, it was taken by the Mobile office out of the customer's margin, and if that was insufficient to pay the loss, the customer was called on for the balance. No actual delivery of cotton was ever made on such contracts, except in a few instances, and then at the place of its execution, to-wit, New York or New Orleans. When the cotton was delivered on a contract of purchase, it was held by defendants for the purchaser, as his agent-, until they were ordered to sell it; when the delivery was made upon a contract of sale, the seller would ship the cotton from Alabama to New York or New Orleans, the place of

delivery, and defendants, as his agent-, would there deliver it to the buyer.

22 The only question presented for our consideration is, whether the business, thus shown to have been engaged in by defendants, was interstate commerce, and, therefore, not subject to the license tax sought to be collected of them. For clearly if the business is not subject to be taxed, although the one for which defendants are here sought to be made liable may be characterized as an occupation tax, there can be no recovery in this case.—*Stratford v. City Council of Montgomery,* 11 Ala., 619.

But the defendants' business of making contracts of buying and selling future cotton for their customers is not interstate commerce. Indeed, these contracts are not articles of commerce at all.—17 Am. & Eng. Ency. Law, (2nd ed.) p. 61. As was said by the Supreme Court of the United States in *Paul v. Virginia,* (8 Wall. 183) in speaking of policies of insurance: "These contracts are not contracts of commerce in any proper meaning of the word. They are not subject of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different states."—See also *Hooper v. California,* 155 U. S. 648; *N. Y. Life Insu. Co. v. Cravens,* 178 U. S., 389. This principle, we think, clearly controls in this case and its application to the facts makes the defendants liable.

The contracts entered into by defendants for their customers, if discharged by the payment of differences in the market values, though executed in another state by and through their agents, the defendants, are clearly not articles of commerce; and the transaction was not different from one had the customer himself in person executed the order on the exchange in New York or New Orleans. Nor is it of consequence, in so far as the question here is involved, that the contracts were sometimes discharged by the delivery of the cotton. While it is true the cotton may have become an article of inter-state commerce, it never became an article of trade from one state to another until it begun to move and this movement did not begin until the cotton was shipped or was started for transportation from the one state to the other.—*Kidd v. Pearson,* 128 U. S., 25.

23 There is no stipulation shown in the agreed statement of facts which required the seller to ship cotton from any point. He was at liberty to acquire the cotton in the market of delivery or elsewhere; hence, a shipment from one state to another for delivery under the contract would not be inter-state commerce by virtue of the contract, but by the subsequent and independent act of the seller. And the shipment in that event would not become interstate commerce until the cotton had commenced to be transported.

The case of *Stratford v. City Council, supra,* relied upon by ap-

pellants, clearly has no application. In that case Stratford was a broker representing several non-resident wholesale dealers in grain and provisions who lived and carried on their business in other states; and every order for goods from local merchants received or obtained by him was forwarded to his principal, subject to the approval of such principal. And if the order was accepted by the non-resident dealer, he shipped the goods from his place of business to the purchaser who did business in the City of Montgomery.

Affirmed.

Weakley, C. J., Simpson and Anderson, JJ. Concurring.

To be reported.

24 In the Supreme Court of the United States.

WARE AND LELAND ET AL., Plaintiffs in Error,
vs.
THE STATE OF ALABAMA, Defendant in Error.

I, Robert F. Ligon, Clerk of the Supreme Court of the State of Alabama, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from one to twenty-three, both inclusive, contain a true, full and complete transcript of the records and proceedings had in said Court, in the case of Ware and Leland *et al.*, appellants, *vs.* State of Alabama, appellee, (1st Division, No. 355), as the same appear of record and on file in this office.

In testimony whereof, I have hereunto affixed my official signature, as Clerk of the Supreme Court of Alabama, and have caused the Seal of said Supreme Court to be hereunto affixed, at the Capitol, in the City of Montgomery, Alabama, this 26th day of November, 1906.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

25 Supreme Court of Alabama. Filed Nov. 3, 1906. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama. At Law.

WARE AND LELAND ET AL., Original Defendants and Appellants,
vs.
THE STATE OF ALABAMA.

Petition for Writ of Error.

And now comes petitioners Ware and Leland *et al.*, the defendants and appellants herein, and say that on or about the 8th day of May 1906 this court entered judgment herein in favor of the plaintiff

and appellee, and against these defendants and appellees, and in which judgment and the proceedings had prior thereunto in this case, certain errors were committed to the prejudice of these defendants and appellees, all of which will more in detail appear from the assignment of errors which is filed with this petition.

And these petitioners show that said judgment so rendered on said 8th day of May 1906 by this Court was a final judgment in the highest court of the State of Alabama in which a decision herein could be had, and that said decision and judgment drew into question the validity of an act of the legislature of the State of Alabama, the same being the legislative branch of the government of the State of Alabama, upon the ground of such act or authority being repugnant to the Constitution of the United States, and that the decision herein was in favor of the validity of said act of said legislature of the State of Alabama, and that likewise there was drawn in question a right claimed under the constitution of the United States and that the decision there-in was against the right set up or claimed by these petitioners under the constitution of the United States.

Peittioners show that said questions were specially set up and presented to the State Court wherein said cause originated and
26 in said Supreme Court of Alabama; that said matters were decided by said Supreme Court of Alabama, the highest court in said State, and that the decision thereof was necessary to the judgment rendered herein.

Wherefore these petitioners pray that a writ of error may issue in their behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to said Supreme Court of the United States.

B. B. BOONE,
Attorney for Ware and Leland et al., Petitioners.

27 Supreme Court of Alabama. Filed Nov. 3, 1906. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

THE STATE OF ALABAMA
vs.
WARE AND LELAND ET AL., Original Defendants and Appellants.

This 3d day of November A. D. 1906, came Ware and Leland a copartnership, and J. H. Ware, E. F. Leland and F. J. Fahey, the appellants in the Supreme Court of Alabama (defendants below) and plaintiffs in error in the Supreme Court of the United States, by their attorney and filed herein and presented to the undersigned Chief Justice of the Supreme Court of Alabama, their petition praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment of the Supreme Court of Alabama was rendered, duly authenticated, may be sent to

the Supreme Court of the United States at the Capitol in Washington, District of Columbia, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the undersigned Samuel D. Weakley, Chief Justice of the Supreme Court of Alabama, does hereby allow the writ of error prayed for upon the said Ware and Leland *et al.* giving bond according to law in the sum of Nine hundred dollars which shall operate as a supersedeas bond.

And I the said Samuel D. Weakley, Chief Justice as aforesaid, do hereby certify that the said Supreme Court of Alabama is the highest court in said State of Alabama having jurisdiction of said case and the questions therein decided, and that said decision and judgment of the Supreme Court of Alabama, to reverse which a writ of error is prayed for by said Ware and Leland *et al.*, drew into question the validity of an act of the legislature of the State
28 of Alabama, the same being the legislative branch of the government of the State of Alabama, upon the ground that such act in so far as it was attempted to be enforced against the appellants was repugnant to the Constitution of the United States, and that the decision of said Supreme Court of Alabama therein was in favor of the validity of said act of the legislature of the State of Alabama; and that likewise said decision and judgment of the Supreme Court of Alabama drew into question a right claimed by the said Ware and Leland *et al.* under the Constitution of the United States, and that the decision therein was against the right so set up or claimed by said Ware and Leland *et al.* under the Constitution of the United States; that said matters were decided by said Supreme Court and that the decision thereof was necessary to the judgment of said Supreme Court of Alabama.

Witness my hand and the seal of the Supreme Court of Alabama on the day and year first aforesaid.

SAMUEL D. WEAKLEY,
Chief Justice of the Supreme Court of Alabama.

29 Copy.

In the Supreme Court of Alabama.

THE STATE OF ALABAMA, Original Plaintiff and Appellee.
vs.
WARE AND LELAND, a Copartnership Composed of J. H. Ware, E. F. Leland, Chas. W. Lee, and F. J. Fahey, and J. H. WARE, E. F. LELAND, CHAS. W. LEE, and F. J. FAHEY, as Individuals.

Know all men by these presents, that we, Ware and Leland a copartnership, and J. H. Ware, E. F. Leland, Chas. W. Lee, and F. J. Fahey, and the American Surety Company, as surety, the last named being a corporation, are held and firm bound unto the *the* State of Alabama, in the full and just sum of Nine hundred dollars, to be paid to the State of Alabama its certain attorneys,

or assigns, to which payment, well and truly to be made, we bind ourselves, itself, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents. Sealed with seals and dated this 3rd day of November, 1906.

Whereas, lately in the Supreme Court of Alabama, in a suit pending in said Court wherein the State of Alabama, was appellee (and plaintiff in the Circuit Court of Mobile County), and said Ware and Leland *et al.* were appellants (and defendants in said Circuit Court of Mobile County, Alabama), a judgment was rendered against said Ware and Leland *et al.*, and the said Ware and Leland *et al.* having obtained a writ of error returnable to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of said Supreme Court of Alabama, to reverse the judgment of the Supreme Court of Alabama in the aforesaid suit, and a citation directed to the said State of Alabama citing and admonishing it to be and appear before the Supreme Court of the United States within thirty days from the date of said writ of error and said citation.

Now the consideration of the above obligation is such, that if the said Ware and Leland *et al.* shall prosecute said writ of error to effect and answer all damages and costs if they fail to make
30 such plea good, then this obligation to be void; else to remain in full force and virtue.

(Sig.) WARE & LELAND, [SEAL.]
By J. SYD. ROBBINS, *Mgr.* [SEAL.]
J. H. WARE.
By B. B. BOONE, *Att'y.* [SEAL.]
E. F. LELAND,
By B. B. BOONE. [SEAL.]
F. J. FAHEY,
By B. B. BOONE, *Att'y.* [SEAL.]
CHAS. W. LEE,
By B. B. BOONE, *Att'y.* [SEAL.]
AMERICAN SURETY COMPANY,
By L. C. FRY,
Resident Vice-President.

Attest:
PALMER PILLANS,
Res. Ass't Sec'y.

[Seal American Surety Company of New York.]

Filing: Supreme Court of Alabama. Filed Nov. 5, 1906.
ROB'T F. LIGON, JR., *Clerk.*

31 Supreme Court of Alabama. Filed Nov. 3, 1906. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama. At Law.

WARE AND LELAND ET AL., Original Defendants and Appellants,
vs.
THE STATE OF ALABAMA.

Assignment of Errors.

The said Ware and Leland, *et al*,. plaintiffs in error, who were appellants in the Supreme Court of Alabama, and defendants in the court of original jurisdiction, in connection with their petition for a writ of error make the following assignment of errors which they aver occurred upon the trial and determination of said cause in the Supreme Court of Alabama.

1. Said Supreme Court of Alabama erred in affirming the judgment of the Circuit Court of Mobile County, which judgment of said Circuit Court was against the said appellants Ware and Leland *et al.*

2. The Supreme Court of Alabama erred in not holding that the defendants and appellants Ware and Leland *et al.* were not liable for the license tax demanded by the appellee and was not guilty of any violation of any valid act of the legislature of the State of Alabama under the facts of this cause.

3. The Supreme Court of Alabama erred in holding that the defendants and appellants Ware and Leland *et al.* under the facts in this cause were carrying on an independent domestic business for which the appellee had the right to require the prepayment of a license tax.

4. The Supreme Court of Alabama erred in holding under the plea of the defendants and appellants filed in the Circuit Court of Mobile County and under the facts in this cause, that the business shown by the facts in support of said plea for the transaction of which a license was demanded in this cause, was inter-state
32 commerce for the transaction of which the appellee had no authority to charge a license.

5. The Supreme Court of Alabama erred in deciding that the Circuit Court of Mobile County properly gave the general affirmative charge for the appellee and that a like charge asked by the appellants was properly refused by said Circuit Court of Mobile County.

6. The Supreme Court of Alabama erred in deciding said appeal pending before it in favor of the appellee and against the appellants, Ware and Leland *et al.* And the said Ware and Leland *et al.*, plaintiffs in error, pray that the Supreme Court of the United States will reverse and annul said judgment of the Supreme Court of Alabama aforesaid.

B. B. BOONE,
Attorney for Ware and Leland et al.

33 Supreme Court of Alabama. Filed Nov. 3, 1906. Rob't F. Ligon, Jr., Clerk.

Writ of Error.

WARE AND LELAND, a Copartnership, J. H. WARE, E. F. LELAND, CHARLES W. LEE, and F. J. FAHEY, as Individuals, Plaintiffs in Error,

vs.

THE STATE OF ALABAMA, Defendant in Error.

The President of the United States to the Honorable the Judges of the Supreme Court of Alabama, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court of Alabama, before you, being the highest court of law or equity in said State in which a decision could be had in a suit between Ware and Leland a corpartnership, and J. H. Ware, E. F. Leland, Charles W. Lee and F. J. Fahey as individuals, as plaintiffs in error (original defendants, and appellants in your said Supreme Court) and the State of Alabama as defendant in error (original plaintiff and appellee in your said Supreme Court) and wherein judgment was in favor of the said State of Alabama in said Supreme Court of Alabama on the 8th. day of May 1906 and against the said Ware and Leland *et al.*, in which said suit said Ware and Leland *et al.* relied for their defense upon their plea that a certain act of the legislature of the State of Alabama, the same being the legislative branch of the government, and the basis of the demand against said Ware and Leland *et al.* was invalid as applied to them under this case because repugnant to the Constitution of the United States and the decision of said Supreme Court of Alabama was in favor of the validity of said act of said legislature of the State of Alabama, and the further defense that the acts of the said Ware and Leland *et al.* were the exercise of a right claimed under the constitution of the United States and the decision of the said Supreme Court of Alabama was against the right under the constitution of the United States so set up; all to the great damage of the said Ware and Leland *et al.*

34 as by their complaint appears; and we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties as aforesaid in this behalf, do command you if judgment herein be given, that then, under your seal distinctly and openly, you send the record and the proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington, D. C. within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of November, in the year of our Lord one thousand nine hundred and six.

[Seal United States Circuit Court, Southern Dist. of Ala.]

RICH'D JONES,
Clerk of the Circuit Court of the United States, Southern District of Alabama.

Allowed by
SAMUEL D. WEAKLEY,
Chief Justice of the Supreme Court of Alabama.

Nov. 3, 1906.

35 Supreme Court of Alabama. Filed Nov. 5, 1906. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

WARE AND LELAND ET AL.
vs.
THE STATE OF ALABAMA, Original Plaintiff and Appellee.

To the State of Alabama, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol in the City of Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the Clerk's office of the Supreme Court of Alabama, wherein Ware and Leland a copartnership, and J. H. Ware, E. F. Leland, Charles W. Lee, and F. J. Fahey as individuals, are plaintiffs in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered in your favor against said plaintiffs in error, by the Supreme Court of Alabama as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of November, A. D. 1906.

SAMUEL D. WEAKLEY,
Chief Justice of the Supreme Court of Alabama.

Service of this citation is accepted and the receipt of a copy thereof is hereby acknowledged this November 5th, A. D. 1906.

N. R. CLARKE,
Attorney for the State of Alabama.

36 WARE AND LELAND ET AL., Plaintiffs in Error,
vs.
THE STATE OF ALABAMA, Defendant in Error.

In the Supreme Court of the United States.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the records and proceedings in said cause, duly certified and authenticated according to law, to the Honorable the Supreme Court of the United States.

In testimony whereof, I have hereunto affixed my official signature as Clerk of the Supreme Court of Alabama, and have caused the Seal of said Supreme Court to be hereunto affixed, at the Capitol, in the City of Montgomery, Alabama, in the Year of Our Lord, One Thousand, Nine hundred and six, and of the Independence of the United States the One hundred and thirty-first.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 20,491. Alabama supreme court. Term No. 174. Ware & Leland, a corporation, and J. H. Ware, E. F. Leland, Charles W. Lee, and F. J. Fahey, plaintiffs in error, *vs.* The State of Alabama. Filed December 18th, 1906. File No. 20,491.

Office Supreme Court, U. S.
FILED.
JAN 27 1908
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 174.

WARE & LELAND, Appellants,

VS.

STATE OF ALABAMA.

BRIEF OF B. B. BOONE FOR THE APPELLANTS.

PATTERSON, PRINTER, BOISE.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 174.

WARE & LELAND, Appellants,

VS.

STATE OF ALABAMA.

BRIEF OF B. B. BOONE FOR THE APPELLANTS.

STATEMENT OF THE CASE.

These two cases, Nos. 173 and 174, present identically the same facts and questions for decision. These proceedings were commenced in the Circuit Court of Mobile County, State of Alabama, and sought to recover license taxes from the appellants for doing business in the County of Mobile, in the State of Alabama; said licenses taxes being alleged to be due to the State of Alabama, and to Mobile County.

Judgments were rendered in each case in the Circuit Court of Mobile County against the appellants which were affirmed by the Supreme Court of Alabama; writs of error in each case sued out and the case brought to this Court.

The sole question for decision is whether or not the appellants were engaged exclusively in inter-state commerce business and therefore not liable to pay license taxes to the State of Alabama nor to Mobile County.

Both of the cases were tried upon the following agreed statement of facts :

"During the whole of the year of 1903, the defendants had an office in the City of Mobile, in the County of Mobile and State of Alabama ; they also had offices in the City of New York in the State of New York, and in the City of New Orleans in the State of Louisiana, and in the City of Chicago in the State of Illinois, each of which offices were connected by private telegraph wires with said Mobile office. Said Mobile, Alabama, office was in charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton for future delivery, on commission, for the public generally and for special customers, said business being conducted in the following way and in no other. They would undertake through their agent, to buy or sell a cotton future contract for a customer in the Cotton Exchange in New York or in New Orleans as he might select, he making at the time a deposit of money with them as a margin to protect them against loss in making such transaction for him. When the customer gave the order to Ware and Leland either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, but when the the transaction was commenced by a purchase or sale of the cotton, Ware and Leland would immediately furnish to the customer a memorandum thereof partly written and partly printed, upon which the following stipulations were printed : " On all marginal business, we reserve the right to close transactions without further notice when margins are about exhausted and to settle contracts in accordance with the rules and customs of the Exchange on which the order is placed;

it being understood and agreed in all trades that actual delivery is contemplated " and " All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the exchange on which the order is placed, and the rules, regulations and requirements of the board of managers of said exchange, and all amendments that may be made thereto." Such agent would thereupon transmit such order by private telegraph line to the defendants' office in the City without the State of Alabama selected for such transaction ; that such order would be thereupon executed by defendants by the purchase or sale, as directed, of a future cotton contract for such customer in the Cotton Exchange of the city to which such an order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations of such cotton exchange may be introduced in evidence by defendants in this cause ; that such contract would be held by defendants for such customer until he ordered the same closed out, when they would sell or buy another cotton contract against it as might be necessary to cover the same or close it out, or receive and deliver the cotton on said contract. If a profit was made on the transaction, defendants remitted the same to its agent in Mobile, who paid it over to the customer ; if a loss was made, it was taken by the agent out of the customer's margin, or, if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customers. No actual delivery of cotton or grain was ever made on any such contracts, except in a few instances, when such deliveries were made the contracts were executed, to wit, in New York, or in New Orleans, Louisiana, or Chicago, Illinois. When any such delivery of cotton was made to the defendants for the customer on a purchase by him, it was held by the defendants for the account of the customer at the place of delivery, either in New York, New York, or in New

Orleans, Louisiana, until ordered sold by the customer and was then sold by them there for the account of the customer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures by them for a customer, the cotton was shipped by the customer for whom such sale was made from Alabama to the place of sale and there delivered through defendants to the buyer. A similar future grain business was done by defendants at their said office in Mobile, Ala., for customers through their office in Chicago, in the State of Illinois—said orders being executed on the Chicago, Illinois, Board of Trade and subject to its rules and regulations which contemplated and provided for the actual receipt or delivery of grain bought or sold therein—such delivery to be made in Chicago, Illinois, During the whole of the year 1903 said City of Mobile, Alabama, was a city of more than twenty thousand inhabitants. Defendants paid to the plaintiff a license tax of two hundred dollars for doing such business in said city for the year 1903, which payment was made prior to the fourth of March 1903 ; they have not paid any further license tax to plaintiff for doing such business in said year. It is agreed between the parties to this cause that if, upon the foregoing facts and such other evidence as may be introduced, the business so done by the defendants was inter-state commerce business, a license tax thereupon would be an unlawful interference with inter-state commerce business and in violation of Article I, Section VIII, Paragraph 3 of the Constitution of the United States, then defendants are entitled to a verdict.

R. H. and N. R. CLARKE,
Attorneys for the Plaintiff.
B. B. BOONE,
Attorney for the Defendants.

Counsel for the plaintiff then admitted in open court before the jury that the rules and regulations of the New

York, New York, Cotton Exchange, and of the New Orleans, Louisiana, Cotton Exchange, and of the Chicago, Illinois, Board of Trade, respectively, provided that contracts executed therein should be in writing; and also provided that in every cotton or grain contract for future delivery executed and entered into in said Exchange or Board of Trade, it should be stipulated, agreed and understood that an actual receipt and delivery of the cotton or grain was to be had, and that said contracts were transferable and assignable. This was all the evidence adduced upon the trial of this cause."

Thereupon the plaintiff asked the Court to give to the jury the following charge, which said charge was in writing: No. I. The Court charges the jury that if they believe the evidence they will find for the plaintiff for the amount claimed in the complaint and interest thereon from the first day of April, 1903. Transcript pages 7, 8 and 9.

ARGUMENT.

We insist that the agreed statement of facts above set out show that the business being done and the only business done was the transmission of orders for the sale or purchase of cotton future contracts or grain future contracts by telegraph from Mobile, Alabama, to points without the State of Alabama. That the agent of the appellants at Mobile, Alabama, secured orders from customers of appellants in Mobile, Alabama, and at once telegraphed said orders on to the appellants at New York, New York, New Orleans, Louisiana, or Chicago, Illinois, to be by them executed on the Cotton Exchange of New York, in the State of New York, or in the Cotton Exchange of New Orleans, in the State of Louisiana, or in the Chicago, Illinois, Board of Trade. It has been held by this Court that a telegraph company whose business is in the transmission of messages from one State to another and

which is invested with the powers and privileges conferred by Congress, cannot be forced by the State, as a condition of doing business in its jurisdiction, to pay a license tax, the same being free from the control of State regulations, except such as are strictly of a police character. Leloup vs. Mobile, 127 United States, 640.

We perceive no difference in principle between the business of a telegraph company in sending telegraphic messages from one State to another, and the business of the appellants which consists exclusively in securing, it the business, from citizens of one State and telegraphing it to them in other States. The medium of inter-state communication being the same in each case—the telegraph line. In Western Union Telegraph Company vs. Pendleton, 122 United States, 347, this Court "recognized that the commerce with foreign "countries and among the States which Congress could reg- "ulate as including not only the exchange and transportation "of commodities, or visible, tangible things, but the carriage "of persons, and the transmission by telegraph of ideas, "wishes, orders, and intelligence." Mr. Justice Harlan in Champion vs. Ames, 188 United States, bottom of page 351. says: "In Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 United States, 1, 9, 12, the Court having under consideration the scope of the commerce clause, Chief Justice Waite for the Court said: "Since the case of Gibbons vs. Ogden, 9 Wheaton, 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. * * * * * As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it

has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions."

The appellants were acting as brokers doing business for others for a commission paid to them, by telegraphing orders from one State to another and executing them, and this Court through Mr. Justice Holmes in Hanley vs Kansas City Southern Railroad Company, 187 United States, (bottom of page 619), said: "Transportation (or telepraghing for others we say) as independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." The agreed facts show that when a purchase or sale of cotton or grain was commenced by a purchase or sale, Ware and Leland would immediately furnish to their customer a memorandum thereof partly written and partly printed, upon which the following stipulations were printed: it being understood and agreed in all trades that actual delivery is contemplated." Transcript page 8. Applying the language of Mr. Justice Holmes in Hanley vs. Kansas City Southern Railroad Company, we say that the appellants were engaged solely in an independent business as brokers, telegraphing through their agent at Mobile, Alabama, to them at New York, New Orleans and Chicago, the orders for the purchase and sale of commodities upon the exchanges of those cities, and that whether the citizens giving these orders to the agent of the appellants in Mobile, Alabama, intended to receive or deliver the commodities so sold or purchased for them by Ware and Leland did not prevent such transactions from being inter-state commerce. In the case of Stradford vs. the City Council of Montgomery, 110 Alabama, 619, the Supreme Court of Alabama held, that a license tax imposed by a city upon commercial brokers doing business within the municipality is

not applicable to brokers who represent non-resident principals exclusively; and if so applied that the tax is an invasion of the commerce clause of the Constitution of the United States, and is unconstitutional and void. In the case of Stockard vs. Morgan, 185 United States, 27, this Court through Mr. Justice Peckham held that a privilege tax imposed by a State statute upon residents of that State as merchandise brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the State, as agents for non-resident parties, firms or corporations for goods to be shipped by such non-resident principals to such jobbers or dealers, is an unconstitutional invasion of the commerce clause of the Constitution of the United States, and cites with approval the case of Stratford vs. the City Council of Montgomery, 110 Alabama, 619, saying: "That such a tax amounts to an invasion of the commerce clause of the Constitution of the United States is "held in Stratford vs. the City Council of Montgomery, 110 "Alabama, 619, in a most satisfactory opinion by Chief Justice Brickell. In speaking of the tax under the Alabama "statute, he said, page 628, 'While, as we have shown, the '"business of the defendant was general, so as to constitute "'him a broker, it by no means follows that it required that "'he should take local business. He might, as he did, con-"'fine himself to inter-state business and still be a "broker" "'without becoming liable to the tax.' The statute of Ala-"bama is similar to the one in Tennessee, and the facts in "the above case are almost identical with those agreed upon "herein. Although the State has general power to tax in-"dividuals and property within its jurisdiction, yet it has no "power to tax inter-state commerce, even in the person of a "resident of the State."

That the contracts for the purchase and sale of commodities was made by the brokerage firm of Ware and Leland, the plaintiffs in error, through their agent in Mobile,

Alabama, to be executed in cities without the State of Alabama, does not change the character of the commerce. In Rearick vs. Pennsylvania, 203 United States, 507, Mr. Justice Holmes for this Court said at page 511: "If there were "the slightest reason to doubt that the contracts were made "with the company through its authorized agent at the mo- "ment when the orders were given, which we do not per- "ceive that there is, certainly the contrary could not be as- "sumed in order to sustain a conviction. It is for the prose- "cution to make out its case. We may mention here, in "parenthesis, that of course it does not matter to the ques- "tion before us that the contract was made in Pennsylvania. "Brennan vs. Titusville, 153 United States, 289. * * * * " 'Commerce among the several states' is a practical concep- "tion, not drawn from the 'witty diversities' (Yaites vs. "Gough, Yelv., 33), of the law of sales. Swift and Company "vs. the United States, 196 United States, 375. The "brooms were specifically appropriated to spe- "cific contracts, in a practical, if not in a "technical, sense. Under such circumstances it is plain "that, wherever might have been the title, the transport of "brooms for the purpose of fulfilling the contracts was pro- "tected commerce. In Brennan vs. Titusville, supra, pictures "were sold by sample, as the brooms were here, and although "the pictures were consigned to the purchasers directly, the "railroad collecting the price, there was no discussion of the "question whether the title had passed. In American Ex- "press Company vs. Iowa, 196 United States, 133, that ques- "tion was referred to only to be waived. In Caldwell vs. "North Carolina (187 U. S., 622), the pictures were con- "signed to the defendant, an agent, as here, with the addi- "tional facts that the pictures and frames were sent in large "packages, which were opened by the agent on their arrival, "and that the pictures, then for the first time, were put into "their proper frames, and, for all that appears, then for the

"first time appropriated to specific purchasers. In the "Court below all the judges agreed that the title did not "pass until delivery. 127 N. C., 521, 526, 527. This Court "intimated nothing to the contrary. On the special verdict "it well might be that the sale was by sample as in Brennan "vs. Titusville. It was decided that the intervention of an "agent made no difference in the result."

The agreed statement of facts clearly shows, to quote the opinion of the Supreme Court of Alabama in this case, 146 Alabama at page 169, that: "No actual delivery of cot- "ton was ever made on such contracts, except in a few in- "stances, and then at the place of its execution, to-wit, New "York or New Orleans. When the cotton was "delivered on "a contract of purchase, it was held by the defendants for "the purchaser, as his agent, until they were ordered to sell "it; when the delivery was made upon a contract of sale, "the seller would ship the cotton from Alabama to New "York or New Orleans, the place of delivery, and defen- "dants, as his agent, would there deliver it to the buyer." Hence we contend that the record shows that actual transportation of cotton from Alabama to New York and New Orleans grew out of the telegraphic orders sent to the plaintiffs in error at New York and New Orleans by Robbins, their agent in Mobile, Alabama, in fulfilling the contracts made in those cities, just as the brooms were shipped from Ohio to Pennsylvania in the case of Rearick vs. Pennsylvania, supra. It must be remembered that the agreed facts deal with the business done during the year 1903, in Mobile, Alabama, and for the doing of which the license taxes now in question are sought to be enforced. The statute does not attempt to countenance gambling contracts because, as it is set out in the opinion of the Supreme Court of Alabama in this case, 146 Alabama, page 168, it provides, that "this "shall not be held to legalize any contract which would "otherwise be invalid," hence, admitting for the sake of ar-

gument, that those contracts which were entered into in the Cotton Exchanges of New York and New Orleans by plaintiffs in error as brokers representing their principals in Mobile, Alabama, and which were settled without receiving or delivering the cotton were void, then the license operated only upon the valid inter-state business done by the plaintiffs in error.

In the Lottery Case, 188, United States, 321, this Court in an exhaustive opinion delivered by Mr. Justice Harlan held that the carriage of lottery tickets from one State to another by an express company engaged in carrying freight and packages from State to State is inter-state commerce, which Congress under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets to be carried; and as we have heretofore shown in this brief used the following language at page 352: "In "Western Union Telegraph Company vs. Pendleton, 117 "United States, the Court recognized the commerce with "foreign countries and among the States which Congress "could regulate as including not only the exchange and trans- "portation of commodities, or visible, tangible things, but "the carriage of persons, and the transmission by telegraph "of ideas, wishes, orders, and intelligence."

It is a great mistake to suppose that future contracts for the purchase or sale of cotton or grain create no rights of action or are not factors in inter-state commerce because it is well known that many cotton mills throughout the United States meet their wants by purchasing cotton for future delivery on the Cotton Exchanges of New York and New Orleans. The Supreme Court of Alabama in the case of the Western Union Telegraph Company vs. Chamblee, 122 Alabama, at page 436, tersely sustains our argument in these words: "Such contracts, as the authorities generally "concur in holding, are valid, though the vendor neither has "the goods in hand, nor has contracted for the purchase of

"them, and has no expectation of acquiring them otherwise "than by their purchase at some date before the day of de- "livery."

It will be observed that the agreed facts show when a purchase or sale of a cotton or grain future contract was begun that the agent of the plaintiffs in error, in Mobile, Alabama, one Robbins, at once gave to the customer a memorandum containing the stipulations that "in all trades actual delivery is contemplated," and that "all purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and contracts of the exchange on which the order is placed, etc." We contend that there is no evidence in the record to show that the agent of the plaintiffs in error knew when the commodities were bought and sold that the purchasers or sellers did not intend to receive or deliver the same according to their contracts. "If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal." Mr. Justice Harlan in Embry vs. Jamison, 131 United States, at page 346, quoting from Story vs. Salomon, 71 New York, 420, 422.

All agree that the Congress of the United States has power to regulate or prohibit the making of future contracts by telegraph from one State to another, under the commerce clause of the Constitution of the United States. In 1893 Mr. Hatch, of Missouri, introduced such a bill in the House of Representatives, and during the present session of Congress Mr. Burleson, of Texas, introduced a similar bill. The Court will take judicial knowledge of these measures, the last of which is based upon the decision of this Court in the Lottery Case, 188 United States, 321. Upon the facts found in the transcript of the record and the law applicable thereto it seems to us plain that the license tax in question sought

to be collected from the plaintiffs in error is a burden upon and a regulation of inter-state commerce, and in conflict with Article 1, Section VIII., paragraph 3, of the Constitution of the United States, and that the judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

BURWELL BOYKIN BOONE,

Counsel for Plaintiffs in Error.